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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

- - - - - X  
UNITED STATES OF AMERICA : 13-CR-607

-against-

US District Court  
Central Islip, NY

PHILLIP A. KENNER a/k/a  
PHILIP A. KENNER, and  
TOMMY C. CONSTANTINE a/k/a  
TOMMY C. HORMOVITIS,

Defendants.: July 2, 2015  
- - - - - X 9:30 am

TRANSCRIPT OF TRIAL  
BEFORE THE HONORABLE JOSEPH F. BIANCO  
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government:

KELLY T. CURRIE  
United States Attorney  
One Pierrepont Plaza  
Brooklyn, New York 11201  
By: JAMES MISKIEWICZ, ESQ.  
SARITA KOMATIREDDY, ESQ.  
United States Attorneys

For the Defense:

RICHARD D. HALEY ESQ.  
For Defendant Kenner  
  
ROBERT LaRUSSO, ESQ.  
ANDREW L. OLIVERAS, ESQ.  
For Defendant Constantine

Court Reporter:

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Proceedings recorded by mechanical stenography.  
Transcript produced by CAT.

Dominick M. Tursi, CM, CSR  
Official US District Court Reporter

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1 (Call to Order of the Court. Appearances noted  
2 as indicated above.)

3 THE COURT: Before we proceed, there were three  
4 outstanding issues from yesterday. One was the issue of  
5 the special verdict on the conspiracy objectives. Also,  
6 we didn't go back to this yesterday but, Mr. LaRusso, you  
7 want to have additional time to think about whether you  
8 wanted either a multiple conspiracy instruction or a venue  
9 instruction to the jury.

10 Do you want either or both of those or not?

11 MR. LaRUSSO: Judge. On the first one, I am  
12 going to withdraw our request for a special verdict so  
13 that need not be addressed.

14 THE COURT: Okay. You made me do all the  
15 research for nothing?

16 MR. LaRUSSO: I did research also. I actually  
17 did the same, judge. Last night, rather than going home,  
18 after looking at it and speaking to my client, we decided  
19 to withdraw that.

20 On the venue and on the multiple conspiracies, I  
21 haven't made a decision on it. I know the court wants to  
22 do it today so for purposes of the argument I'm going to  
23 rest on what I said before.

24 THE COURT: So you are resting on those for  
25 purposes of Rule 29. You don't want an instruction to the

1 jury?

2 MR. LaRUSSO: Not at this time. No.

3 THE COURT: What do you mean not at this time?

4 MR. LaRUSSO: I'm not going to ask for it.

5 THE COURT: Mr. Haley, you don't want any of  
6 those instructions?

7 MR. HALEY: No, your Honor. I indicated my  
8 inclination was to not request a special verdict.

9 THE COURT: I'm talking now about the venue and  
10 multiple conspiracy.

11 MR. HALEY: No, sir.

12 THE COURT: Let me confirm that with your  
13 clients on the venue.

14 Mr. Kenner and Mr. Constantine, under the law  
15 you have the right to have the jury decide whether or not  
16 there is venue with respect to each of the counts that  
17 they are considering. That is one of the elements of the  
18 crime, whether or not some aspect of the crime took place  
19 in the Eastern District of New York, and your lawyers have  
20 advised me they don't want me to give an instruction to  
21 the jury where they decide that issue.

22 I just want to confirm that you are in agreement  
23 with that.

24 Mr. Constantine?

25 MR. LaRUSSO: I apologize, your Honor. Just one

1 moment.

2 (Counsel and client confer.)

3 MR. LaRUSSO: Your Honor, I apologize to the  
4 court. This has been a very difficult topic. We have  
5 been discussing it since actually before the trial. And  
6 my client and I feel that this may come an issue later on,  
7 after there is a verdict adverse to us, that venue may be  
8 important. So I'm going to reverse myself and ask the  
9 court to put in venue at this time.

10 THE COURT: I don't have the charge available.  
11 You don't need to see the actual language.

12 MR. LaRUSSO: I don't. We had it in the last  
13 trial so I know what it is.

14 THE COURT: Okay.

15 Mr. Haley?

16 MR. HALEY: Our portion is then academic, your  
17 Honor.

18 THE COURT: You are okay with it being in,  
19 obviously.

20 MR. HALEY: Yes.

21 THE COURT: Okay. So I will put it in.

22 And the only thing, I just want to go back to  
23 yesterday, Mr. LaRusso, with respect to the special  
24 verdict because as a result of the research, I just want  
25 to make sure it is clear that I didn't suggest something

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1 that could be misunderstood. I said if there is a general  
2 verdict, it is possible that the government could be  
3 risking; if there were a favorable verdict for the  
4 government, that they could be risking having that verdict  
5 potentially validated on appeal if one of the three  
6 objectives turned out to be legally insufficient.

7 After researching it last night there actually  
8 is a case called *Griffin v United States*, 5012 US 46, a  
9 1991 case, where the Supreme Court held that the due  
10 process clause does not require that in federal  
11 prosecutions, general guilty verdict in multiple object  
12 conspiracy be set aside if the evidence is inadequate to  
13 support conviction as to one object.

14 So it appears that there is no risk to  
15 particular on that issue; that in fact if the jury came  
16 back with a general verdict, if there was a fact that  
17 there was an evidentiary insufficiency that were  
18 determined by me on a Rule 29 or by Second Circuit later,  
19 the law, based upon the Supreme Court, is that the verdict  
20 still stands for reasons they articulate in that case.

21 I just wanted that to be clear because I  
22 suggested that there was a risk that the government might  
23 be taking but I don't think it is a risk.

24 But in any event I will put on the record even  
25 though the request was withdrawn, in my discretion I was

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1 not going to do it in any event I just want to place it.  
2 I won't wasting time now doing that, but I believe that to  
3 be the case so the record is clear.

4 All right. Are we ready for the summations?

5 MR. MISKIEWICZ: We are.

6 MR. HALEY: Your Honor, one request. I'm not  
7 sure how long summation of Miskiewicz will be but I assume  
8 when it concludes we will take a break.

9 THE COURT: Yes. He said about two hours so I  
10 was going to go for, it is 9:55, about an hour or so and  
11 then take a break.

12 Mr. Miskiewicz, do you still think your  
13 summation is about two hours?

14 MR. MISKIEWICZ: Based on going through it last  
15 night, I might have to revise it. It might be a little  
16 bit over two hours but is not by much.

17 THE COURT: That is okay. Since we are only  
18 doing two today, we have a little bit of leeway.

19 MR. MISKIEWICZ: I would definitely be shooting  
20 to be done by the usual lunch break.

21 THE COURT: Whenever he is done, we will break  
22 for lunch.

23 MR. HALEY: Thank you, sir.

24 THE COURT: Let's bring in the jury.

25 You have received the revised charge. And there

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1 are no issues with the revised charge?

2 MR. MISKIEWICZ: No, your Honor. I looked at it  
3 last night.

4 THE COURT: Mr. Haley, any issues with the  
5 revised charge?

6 MR. HALEY: No, your Honor.

7 (The following ensued in the presence of the  
8 jury at 10 am.)

9 THE COURT: Please be seated.

10 Good morning, members of the jury. Good to see  
11 all this morning.

12 I see a red-white-and-blue theme. That could  
13 not have been an accident.

14 As you know, we are entering the next phase of  
15 the trial, the closing arguments, or the summations, as  
16 they are called. Before the lawyers proceed, I just want  
17 to give you a few instructions.

18 First, I just want to point out that Mr. Semple  
19 did check with his office regarding that exhibit and they  
20 verified that the copy of the worksheet that they have in  
21 their file is identical to the one that was put in  
22 evidence. There was a blocked out portion on a page, so  
23 there is no additional exhibit to put into evidence. That  
24 is the way it was in their file as well.

25 With respect to the instructions that relate to

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1 the summations, let me give you several instructions.

2 First, I mentioned this to you in the beginning  
3 of the case, which is a long time ago but I will emphasize  
4 it to you. The statements by the attorneys in the opening  
5 statements and in the closing statements are not evidence.  
6 Statements by attorneys are not evidence. They are their  
7 arguments about what they think the evidence showed or did  
8 not show in the case. And you are free to accept or  
9 reject those arguments, as you see fit.

10 I just want to emphasize that they are not,  
11 their arguments and statements are not evidence. To the  
12 extent that they say during their summation that the  
13 evidence was, the testimony was, and this is what the  
14 government's testimony or evidence during the trial was,  
15 and your recollection of the testimony or evidence differs  
16 from what the attorneys say, it is what your recollection  
17 is of the evidence that controls; not what an attorney  
18 said the evidence was.

19 And if there is any doubt during your  
20 deliberations, if you are not sure or you don't remember,  
21 as I have told you, you can request a readback of any  
22 portion of testimony from the court reporter. You can  
23 also ask for any physical exhibit, any recording to be  
24 played back to you. Any piece of evidence in the case  
25 that you want to hear or see again is available to you



1 during your deliberations.

2 The next thing is, I do let the attorneys in  
3 their summations comment on what they expect I'm going to  
4 tell you on the law. So you may hear an attorney during  
5 the summation say I expect Judge Bianco to tell you that  
6 the law is X. They are allowed to do that, with the  
7 understanding that obviously if they say something about  
8 the law during their summation and then when you hear my  
9 instructions on the law it differs, it is what I say about  
10 the law that controls, not what an attorney says during  
11 his or her summation.

12 I've gone over my instructions with them so they  
13 have some idea of what I'm going to instruct you on.

14 Finally, you may remember that during the course  
15 of the trial I instructed you that it was not proper for  
16 an attorney during questioning of a witness to comment on  
17 demeanor during the questioning. However, I just want to  
18 emphasize that attorneys are permitted during their  
19 closing statements to make arguments about the  
20 credibility, including the demeanor, of the witnesses.  
21 They are free to do that in their summations. So it is  
22 not improper for them to make reference or arguments to a  
23 witness' demeanor in their summation.

24 Again, like all their arguments, it is up to you  
25 to decide whether to accept or reject any argument that

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1 they may or may not make in that regard.

2 With those instructions we will proceed. As I  
3 told you the government, it is their burden of proof at  
4 all times so they go first. And they also go last. They  
5 will have a rebuttal summation on Monday because they have  
6 the burden of proof.

7 So we will proceed with the government's  
8 summation by Mr. Miskiewicz.

9 SUMMATION FOR GOVERNMENT

10 MR. MISKIEWICZ: Thank you, your Honor.

11 May it please the court, ladies and gentlemen of  
12 the jury, counsel.

13 Before I really begin, you will see over the  
14 next several hours and into Monday our adversarial system  
15 at work. And I will use this line only one more time. I  
16 do not think we will agree on many things but I'm sure I  
17 can speak for all the attorneys in this case, and  
18 certainly in behalf of the government, that your  
19 attention, your dedication, your willingness to give up  
20 many, many days and weeks has both honored you and honored  
21 those of us who serve the Constitution through this place.  
22 And I thank you.

23 Enough buttering you up. Let's go.

24 It took nine week to gets here. I'm going to  
25 submit to you that over that nine weeks you experienced a

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1 microcosm of what Michael Peca, Kristin Peca, Darryl  
2 Sydor, Steve Ruchin, Glenn Murray, all the other hockey  
3 players experienced over more than a decade.

4 And I'm also going to submit to you that there  
5 were two facets, two aspects, of what you experienced. A  
6 quick-and-simple and a long, drawn-out, and complex story.

7 Those two, I'm going to suggest to you, will be  
8 valuable as you go through the evidence and begin to  
9 deliberate impartially and objectively, because, on the  
10 one hand, the frauds probably took the least amount of  
11 time over the last nine weeks to show you.

12 They were done at the speed of light, at the  
13 speed of wire transactions. The deception, the  
14 misinformation, the material omissions that prompted all  
15 the those victims do part with their money and give it to  
16 the defendants in this case and I'm going to go through  
17 it, happened. And I submit to you happened with  
18 overwhelming evidence. And the telling of that story was  
19 fairly simple.

20 What took a long time in this case over the last  
21 nine weeks was the deceptions, the coverup, the lies, the  
22 diversionary tactic of: *It's this guy's fault; it's that*  
23 *guy's fault; it's that guy's fault.*

24 And I believe that when you go back there, you  
25 should look at both of those facets of the evidence that

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1 was presented to you, not only because on the one hand you  
2 must, as the Judge will charge you, line up that evidence  
3 with the elements of the offenses that have been charged  
4 in this indictment, but also because in that coverup,  
5 which took us weeks to burn through, to shed a light on,  
6 you will see evidence of intent to defraud.

7 You will see that from the get-go, from the very  
8 beginning, these two men intended nothing but to steal the  
9 money of those victims.

10 I say this, too. While that evidence is  
11 important, while the evidence of the coverup is important,  
12 I submit, because you can use it to infer the criminal  
13 intent of these individuals, I would also warn you, don't  
14 follow that hall of mirrors, that rabbit hole, because in  
15 the end it is not just the coverup; it is the elements of  
16 the offense that you will be charged. And that which we  
17 will now go through you will see was proven, we believe,  
18 with overwhelming evidence.

19 First, let me go through with you what the  
20 indictment is and what is charged in the indictment.  
21 Count One.

22 Count One charges Tommy Constantine and Philip  
23 Kenner with a conspiracy to commit wire fraud. And there  
24 were three objects to that conspiracy, and it lasted a  
25 number of years.

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1 First, there was the Hawaii land venture, which  
2 you heard about early on and throughout, really, through  
3 John Kaiser and Chris Manfredi, all the records pertaining  
4 to the Lehman closing. The Urban Expansion loan that you  
5 heard about. The Centrum loan, which we will talk about.

6 The second object of that conspiracy, the second  
7 manner, I suppose you can say, in which that conspiracy  
8 was achieved, was through Eufora, Mr. Constantine's  
9 prepaid credit card company, through which millions of  
10 dollars went and also, I submit, disappeared into the  
11 hands, solely for the personal benefit of the defendants.

12 Finally, there is the Global Settlement Fund  
13 objective of this conspiracy. And, as you will recall,  
14 and I'm sure you do, they are pertaining to the fact that  
15 the defendants, by mid-2009, as the lines of credit  
16 belonging to the hockey players were all defaulting, as  
17 the hockey players are suddenly realizing they were  
18 indebted, in some cases over a million dollars, and  
19 started complaining and start sending desperate emails and  
20 phone calls to their financial advisor Mr. Kenner, the  
21 response was: We got a plan for you. We're going to go  
22 sue Ken Jowdy.

23 And the evidence was, as you saw and we will  
24 discuss in brief -- and, believe me, I'm not going to go  
25 over every last piece of evidences. Don't worry, we are

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1 not going to be here for another nine weeks. But you will  
2 see that the evidence was that much of that money just  
3 disappeared and had nothing to do with Ken Jowdy's  
4 litigation.

5 Judge Bianco will instruct you on the elements  
6 of all the crimes and how the government must prove to you  
7 unanimously beyond a reasonable doubt all of those  
8 elements of all of the crimes.

9 As to wire fraud conspiracy, let me just can  
10 touch on one minor thing -- not minor, I'm sorry, but one  
11 of the portions of the instructions that he will give you,  
12 and that is that essentially a criminal conspiracy is  
13 different than the actual crime.

14 It is a criminal partnership. It is a separate  
15 crime from the underlying wire frauds. And he is going to  
16 tell you that there are a number of elements and that they  
17 include that two or more persons, you must be convinced  
18 beyond a reasonable doubt that two or more persons entered  
19 into a particular unlawful agreement that's charged in the  
20 indictment.

21 That the objective of the conspiracy was to  
22 commit at least one of those unlawful acts. And in this  
23 case at least Hawaii or Eufora or the GSF objective.

24 And, third, that the defendant that you are also  
25 considering -- and you must consider them separately --

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1 knowingly and intentionally and willfully became a member  
2 of that conspiracy.

3 That is Count One.

4 Count Two. Actually Count Two through Six. I'm  
5 grouping this for a particular reason.

6 Count Two through Six pertains to the  
7 substantive crime, to the actual defrauding of individual  
8 victims in the taking of their money through fraudulent or  
9 deceptive means, and in using the interstate and foreign  
10 wires to effectuate that fraud. And both defendants are  
11 charged in Counts Two through Six.

12 Counts Seven and Eight have to do with the Sag  
13 Harbor property that you heard of, sometimes referred to  
14 as the Led Better property, here in Suffolk County. This  
15 pertains to, among other things, the wire transfers of  
16 \$395,000 from Michael Peca's line of credit which he had  
17 opened and which he testified he did so believing that it  
18 was there to use essentially for startup or development  
19 purposes and expenses repeated to Hawaii. Hawaii, not  
20 Suffolk County.

21 In those two counts, Seven and Eight only, only,  
22 Mr. Kenner is charged. Mr. Constantine is not charged in  
23 those two counts.

24 And Judge Bianco will, again, instruct you on  
25 the elements of those substantive offenses, the wire

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1 frauds, and he will explain to you what a scheme and  
2 artifice to defraud is and how you must, again, find the  
3 defendants that you are considering knowingly and  
4 willfully participated in those schemes. And also that  
5 the schemes used the interstate wires. He will charge you  
6 on that.

7 I expect that, among other things, in defining  
8 what fraud is, Judge Bianco will tell you that fraud is a  
9 general term and, among other things, it means that it is  
10 there to gain an advantage over another by false  
11 representations, suggestions, or the suppression of the  
12 truth or with deliberate disregard of the truth.

13 It is not stealing or pick-pocketing. It is  
14 convincing somebody to part with their money willingly,  
15 knowingly but without knowing all the material facts.

16 That is what fraud is. And that is what you  
17 will have to decide whether or not the government proved  
18 beyond a reasonable doubt.

19 Finally, Count Nine. Count Nine is the money  
20 laundering count, actually money laundering conspiracy.  
21 And again, both Mr. Kenner and Mr. Constantine are charged  
22 in that final count.

23 Very briefly, I'm going to be talking about  
24 money laundering because in many ways the evidence of the  
25 money laundering dovetails with the evidence of the



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1 broader conspiracy to commit wire fraud as well as the  
2 substantive wire fraud counts. And Judge Bianco will  
3 charge you as to the individual elements that you must  
4 find beyond a reasonable doubt.

5 But in sum and substance I will submit to you  
6 that I anticipate you will hear that, again, there must be  
7 a meeting of the minds, a criminal partnership between  
8 Mr. Constantine and Mr. Kenner to commit this separate  
9 conspiracy.

10 There must have been financial transactions with  
11 the proceeds of the wire fraud. Not just any wire but  
12 proceeds of the wire fraud. And Judge Bianco will explain  
13 to you what *proceeds* means. And that the purpose of those  
14 transactions wasn't just to take money out of an ATM  
15 machine but was to conceal, to conceal ultimately the  
16 disposition and the origin and the nature of the money  
17 that was taken from these victims.

18 Let's talk about Count One. And I'm going to do  
19 my level best to track the indictment and also keep this  
20 as chronological, meaning, from Hawaii to the very end.

21 So as to Count One, let's talk about what that  
22 evidence was and what the evidence is that the government  
23 submits to you that we believe proved that these two men,  
24 Kenner and Constantine, intentionally defrauded victims of  
25 the money that they had intended for the Hawaii land

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1 venture.

2 And central to that is the fact that you heard  
3 and saw exhibits and testimony that much of that money  
4 that was raised to develop the Hawaii land was simply  
5 diverted, diverted to the personal use of the defendants,  
6 either in the form of cash to pay off personal bills or,  
7 in the case of Mr. Kenner we submit the evidence is  
8 overwhelming that it got him a partnership in a resort  
9 down in Cabo San Lucas, Mexico, something that none of the  
10 witnesses, I believe the evidence was, told you that they  
11 intended their money, their lines of credit, to be used  
12 for.

13 Remember what the Hawaii land venture was.  
14 Chris Manfredi, John Kaiser months after 9-11 go to  
15 Hawaii. They find in that paradise 200 some-odd acres of  
16 undeveloped land for \$750,000. You can't even find a  
17 parking space in parts of New York for that money. And  
18 maybe it was too good to be true, but they put their money  
19 down on it and think sought to follow the American dream  
20 and develop it into something.

21 Mr. Kaiser told you that the goal was either to  
22 use his own and Manfredi's own money to build, or at the  
23 very least subdivide and therefore add value to, the  
24 property and make it more likely or more possible for some  
25 other developer to come and do what we have heard now is

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1 vertical construction.

2 I never heard of vertical construction before  
3 this case. I always thought it was just building. But  
4 you know what that means now. Vertical construction.

5 Along comes Mr. Kenner, about a year after that,  
6 and tells the two of them -- and again I'm paraphrasing,  
7 your recollections controls, the transcript controls what  
8 the testimony was -- but in sum and substance Mr. Kaiser I  
9 believe told you that Mr. Kenner represented himself to be  
10 somebody who could provide the financing to do this.

11 He said that his recollection was he recalled  
12 Mr. Kenner saying he was worth half a billion dollars,  
13 \$500,000. And I know you heard in cross-examination  
14 something about Michael Jordan only being worth a billion  
15 dollars.

16 Again, this is one of those mirrors down which  
17 you can follow and get lost in. It really, I submit to  
18 you, doesn't matter, for purposes of what Mr. Kaiser said  
19 overall, whether he said he was worth half a million or  
20 half a billion. What mattered is, both he and Manfredi  
21 were convinced that this was a man who could help them;  
22 that Mr. Kenner was a man who could can help them finance  
23 this project because of his access to hockey players and  
24 others.

25 Only that is not what happened. Now we have to

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1 go to the other side of the story, the other people who  
2 were also dealing with Mr. Kenner at this moment, his  
3 hockey players; the people who, by the way, and I cannot  
4 ask you enough to recall this aspect of every one of their  
5 testimonies.

6 They were not customers of Mr. Kenner. They  
7 were not there to sort of there to sort of trade and  
8 bargain. They were not businessmen trying to get one up  
9 on Mr. Kenner.

10 Mr. Kenner was their financial advisor. One of  
11 the players called him my Jerry McGuire, if you remember  
12 that movie, that they got so close. And you heard that  
13 from many people including Mr. Kaiser, who you saw a  
14 photograph of Kenner at a church function for Mr. Kaiser's  
15 family. They trusted him. That was the relationship.  
16 They entrusted him with their money.

17 And you heard that that money, yes they make a  
18 lot of money for a short period of time as hockey players,  
19 but that money was, for the most part, like their  
20 retirement funds; what would be there for them after  
21 hockey was over. And player after player after player  
22 told you what the deal was as represented to them by  
23 Mr. Kenner with respect to investing in Hawaii.

24 Michael Peca. And again, you will have the  
25 entire transcripts, any portion that you wish to have read

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1 back during your deliberation.

2 But among other things, and I'm not going to  
3 read the entire thing, at page 31 he says the investment  
4 was in two pieces. There was \$100,000 cash portion that  
5 was invested, and then there was going to be a line of  
6 credit for \$1.775 million that I had the ability to do.  
7 That was also going to be invested, which was going to be  
8 used, I was told, to expedite some of the vertical  
9 construction, building some ramps, infrastructure, things  
10 like that. And that was to give me roughly 12 to 13  
11 percent of Little Isle IV.

12 And let's not forget what Little Isle IV is.  
13 Little Isle IV was essentially the parent of all the  
14 Hawaii LLCs, controlled by none other than Philip Kenner.  
15 The operating agreements. The bank accounts. Everything.

16 Tyson Nash. And again, it is there for you to  
17 read, but at page 1908 he says so in general -- well:

18 Question: So in general terms what was your  
19 understanding of how the money would be used?

20 Answer: To buy land.

21 Question: Did he ever tell you that the money  
22 would go to other investors?

23 Answer: No.

24 Did you authorize money to go to other  
25 investors?

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1 No.

2 Did he ever tell you to the money would go to  
3 Mexico?

4 No.

5 Did you authorize money to go to Mexico from  
6 your Hawaii investments?

7 No.

8 Joe Juneau. Remember Joe Juneau? First witness  
9 on the stand. Went to school with Mr. Kenner at RPI.  
10 They were teammates playing college hockey.

11 Page 327, long ago. Nine weeks ago.

12 Question: What does Hawaii have to do with  
13 Mexico? Does it?

14 Answer: I don't -- I don't -- I mean, the only  
15 relation to me is that it's the same financial advisor,  
16 Mr. Kenner, who advised me to go into both.

17 Were they separate deals?

18 I think so. Yeah.

19 You know, when somebody says: I think so, yeah,  
20 you should say well, wait a second. Is that an answer?  
21 Is that, obviously it is an equivocation.

22 He didn't just, though, answer. There was more.  
23 Or I should say, the government didn't just produce the  
24 answer that the witness gave. There was more to this.

25 Government Exhibit 733. This was an email June

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1 17, 2006, between Joe Juneau and Phil Kenner.

2 And remember, many of these emails you have got  
3 to read the bottom and then work your way up. They are in  
4 kind or reverse chronology.

5 So you look at the bottom, at what Joe Juneau  
6 says. He says: Phil. I realize it's hard to read so let  
7 me read it here.

8 Phil, can you tell me, it says 750,000 on the  
9 contract? Didn't I initially sign for 100,000? 3 percent  
10 of the investment from Little Isle. Also 3 percent in the  
11 whole Hawaii deal? Joe. And Mr. Kenner's explanation is  
12 there.

13 But he extent say anything about, you know, some  
14 of your money went to Mexico. Basically, all he says is,  
15 he explains what the line of credit was and how much he  
16 now has invested in Little Isle IV, Hawaii, and also gives  
17 him an estimate of what the, quote, whole Hawaii deal is  
18 worth, parentheses appraised land approximately 90 million  
19 right now.

20 He doesn't say the land is worth approximately  
21 90 million. You heard that appraisal. And there is no  
22 issue. Take again. You can get lost in the sort of what  
23 is important and what is not. But the fact is, the land  
24 was appraised at. Fine. Great. That's why Manfredi and  
25 Kaiser invested in it in the first place.

Summation - Miskiewicz

5700

1 But he doesn't say, as he could here: *The*  
2 *Hawaii land is worth 90 million. By the way, remember Ken*  
3 *Jowdy? I told you about Ken Jowdy? That land is worth.*

4 No. It is not there. It would have been a  
5 perfect time to say it, but it is not there.

6 So when Mr. Juneau says:

7 Question: Were they separate deals? I think  
8 so, yeah. It is because of answers like that he got from  
9 Phil Kenner. Talking only about Hawaii. Talking only  
10 about his money going to Hawaii.

11 Back to Michael Peca, who was asked on  
12 cross-examination about the loan agreement, the pledge  
13 agreement. All of those are in front of you.

14 There is no question here that these men signed  
15 pledge agreements. They, to a greater or lesser extent,  
16 got better or lesser information. This case is not about,  
17 you know, you didn't tell them everything. There is no  
18 question they signed a loan agreement with Northern Trust,  
19 the lines of credit. That is not what the fraud and the  
20 misrepresentation alleged in this aspect of the conspiracy  
21 is about.

22 But what it is about is what that money was to  
23 be used for. And when he was asked on redirect, and we  
24 are jumping ahead now, questions about yes invested in the  
25 Global Settlement Fund.



**Summation - Miskiewicz**

5701

1                   Question: By the way, what if anything did that  
2 litigation regarding Mexico have to do with the 1.775  
3 million in your line of credit that you authorized for the  
4 Hawaii investment? What if anything?

5                   Answer: Nothing.

6                   To this day, as you saw him on the stand, he had  
7 no idea until this trial and what came out and what he was  
8 confronted with and shown in exhibits where his money  
9 went.

10                  Brian Berard, another victim. What about  
11 investing portions of your line of credit to places let's  
12 say in Mexico?

13                  Answer: No.

14                  And listen to what else he says, because this is  
15 characteristic of a number of the victims, these hockey  
16 player victims, because they had both invested in Ken  
17 Jowdy, Phil Kenner, properties in Mexico. El Rosario, you  
18 hushed about. Cabo San Lucas. They knew that they had  
19 money down there.

20                  But the Hawaii money? The Hawaii line of  
21 credit? Look at what Brian Berard says. At that time I  
22 was already invested. One was in the El Rosario property  
23 in Mexico. And then the other was in Cabo San Lucas. And  
24 my investments were 500,000 on El Rosario property and  
25 200,000 on the Cabo San Lucas property.

**Summation - Miskiewicz**

5702

1 And I submit to you that if you read the rest of  
2 his testimony, and we will come back to this later, he had  
3 no idea nor was he advised by the defendant Kenner that  
4 his money would be spent, his line of credit would be  
5 spent, down in Hawaii.

6 By the way, John Kaiser is not only involved in  
7 finding the property and beginning the process of  
8 attempting to develop it. He is also a victim.

9 He testified, and this is at page 975, I will  
10 just point out to you or paraphrase very briefly, that in  
11 or about July of 2005 he is asked by Phil Kenner, this is  
12 after Kenner suggests to him that he has the money to help  
13 develop the property on his own, Kenner asks him for a  
14 million dollar loan.

15 Remember what Kaiser does? He pulls together  
16 money from his mother, you saw his mother testify, and  
17 others, and they pull together a million, and basically  
18 that is the last he ever sees of it.

19 He also, by the way, was told, and remember, the  
20 reason we are here in Long Island is because the  
21 allegation is that portions of the conspiracy affected and  
22 wires touched upon the Eastern District of New York.

23 He says, at 975, that he got a phone call from  
24 Kenner asking him for that wire. And where was he? He  
25 says, I was home in Suffolk County when he got that. And

Summation - Miskiewicz

5703

1 he pulled together the money.

2 And what does he find out about where it goes?

3 He is told it is going to be a short-term loan. 15  
4 percent, 30 days, 60 days, 90 days, years go by. When  
5 does he finally find out what happens to the money? Just  
6 before the Lehman closing, when he testified that Mr.  
7 Manfredi accused Kenner of basically lying to them. His  
8 partners in the Hawaii deal. And that is when he  
9 realizes, or he is told by Mr. Kenner, your money didn't  
10 go to Hawaii. It went to Mexico.

11 And in sum and substance like of like: *Does it*  
12 *really matter?* I mean, it is a million. What's a million  
13 dollars among friends? Does it really matter?

14 Even Sergei Gonchar, the man who was so happy  
15 with Mr. Semple's, whatever that was. Remember  
16 Mr. Semple, the accountant hired to look at the Global  
17 Settlement funds? And you know basically didn't do an  
18 audit. Didn't really do an examination. Just based his  
19 work on whatever he was told by Mr. Constantine. And if  
20 he wasn't told anything by Mr. Constantine, then really  
21 that was it, and he even says he couldn't even reach a  
22 conclusion.

23 There is an old computer expression for that:  
24 Garbage in, garbage out. That was what Mr. Semple's  
25 testimony amounted to. But even Sergei Gonchar, the man

Summation - Miskiewicz

5704

1 who. According to Mr. Semple was like: Oh, I'm fine.  
2 I'm fine. Yes, Global Settlement. Yes, I'm fine. Just  
3 don't tell my wife about playboy, some joke like that.  
4 Very funny.

5 When he was asked about his money with respect  
6 to Hawaii, he says:

7 Answer: Not when the deals were introduced to  
8 us.

9 And there is a question above that. You can  
10 read it at page 4848.

11 Question: The money from Mexico was not  
12 supposed to go as to Hawaii? They were separate?

13 Answer: I mean nobody told me that money was  
14 going to go back and forth when the deals were presented  
15 to me.

16 No. Even Sergei Gonchar.

17 Did they all forget that Mr. Kenner said to them  
18 back in 2003, 2004, when their lines of credit were  
19 indebted to the tune of \$13 million? Did all of those men  
20 forget? Forget they had been told: Oh, well. You know,  
21 it's Hawaii, it's Mexico. It's this. It's that.

22 Judge Bianco will instruct you that it is the  
23 government's burden to prove all the elements of the  
24 offense beyond a reasonable doubt. And he will charge you  
25 on what reasonable doubt means. But I anticipate what he

Summation - Miskiewicz

5705

1 is going to say is, the words almost define themselves.  
2 It is a doubt based upon reason and common sense.  
3 Reasonable doubt is not a speculation or suspicion. It is  
4 not an excuse to avoid an unpleasant duty. It is not  
5 sympathy.

6 So what does, I submit, your common sense tell  
7 you about the fact that all these men, these hockey  
8 players, John Kaiser, said they were told their money was  
9 going to be used for X, and the evidence has shown through  
10 documentation, through bank records, that it went to Y. Y  
11 in this in this case being Hawaii.

12 Listen to what Michael Peca and the defendant  
13 Mr. Constantine say in their recorded conversation on July  
14 12, 2012.

15 (Audio playing.)

16 *"I really appreciate your commentary."*

17 Now, why -- and I'm not trying to be sarcastic  
18 or facetious about it -- the *"commentary?"*

19 But ask yourself, what does common sense dictate  
20 at that moment? As elicited through cross-examination,  
21 and direct I suspect, Mr. Peca was recording that  
22 conversation unbeknownst to the defendant Kenner.

23 Wouldn't it have been, at that late date, 2012,  
24 a great moment for somebody in Mr. Kenner's shoes to say:  
25 Look, Mike. Like I told you a million times before,

Summation - Miskiewicz

5706

1 here's the documentation? Here's the email. Here's the  
2 text. I told you a million times before. You agreed we  
3 were going to send some of the money from Hawaii down to  
4 Ken Jowdy in Mexico.

5 No. That is not what he said. *"I appreciate*  
6 *your commentary."*

7 Does common sense, does reason, does logic  
8 suggest to you that that creates a doubt that: Well,  
9 maybe, maybe they just all forgot? Maybe Peca and Sydor  
10 and Rucchin and Murray and all these guys just forgot that  
11 they had agreed, when they were thinking of Hawaii, they  
12 also thought: Well, money can go down to Mexico, too?

13 No, I submit to you there is no reasonable doubt  
14 that they were told their money was going to Hawaii and  
15 that it was diverted, stolen, defraud through omission,  
16 deceit, lies.

17 There is a number of documents that you will  
18 have to read and look at and study which also, we submit,  
19 proves beyond a reasonable doubt, when you look at the  
20 totality of the circumstances, proves there is no question  
21 these men were lied to by Mr. Kenner about what the money  
22 was for and where it was going.

23 You heard testimony that there was a loan in  
24 December of '04, that Mr. Kenner flew down to Cabo San  
25 Lucas and he signed or got Ken Jowdy to sign a promissory

Summation - Miskiewicz

5707

1 note and it was witnessed by some other guy. You heard  
2 that. All right?

3 So now, does that cause you doubt? It should  
4 cause you a moment to consider. It is evidence you must  
5 consider. But does it create, through common sense and  
6 reason, reasonable doubt that that ever really happened?

7 Think about it. That loan, agreement, is one of  
8 the most important documents that any financial advisor  
9 could have been handling hat that moment. Mr. Kenner or  
10 anyone. It is not his money that he is loaning to this  
11 guy Ken Jowdy. It is his players' money.

12 And again, I say it again, these players are not  
13 customers. They are, you know, they are the men who are,  
14 they are entrusting him: Take care of my money, manage my  
15 money. Some of these guys didn't get through high school.

16 Joe Juneau's brilliant, bottom line is he is an  
17 aeronautical engineer and he still said I didn't know  
18 anything about money. He needed a guy like Kenner --  
19 well, he thought he did -- to manage my money. So it is  
20 their money.

21 Does he bring back an original? No.

22 Does he have two copies: Leaves one with  
23 Mr. Jowdy and brings back the other one? No.

24 Does he, in all the texts all the emails, ever,  
25 ever contemporaneous with the signing of that supposed

**Summation - Miskiewicz**

5708

1 document? And yes, I just used airports, because an I'm  
2 telling right now, the evidence, I submit to you, is that  
3 loan agreement is bogus. Never happened. Didn't exist.  
4 Created as part of the hall of mirrors as part of the  
5 deception and lies to divert attention away from these two  
6 men.

7 And use your common sense and logic. Wouldn't  
8 you, as a financial advisor, particularly in America,  
9 where we sue everybody at the drop of a hat and if by some  
10 chance a financial advisor loses his client's money, what  
11 do you think is going to happen? Whether true or not,  
12 fair or not, what is going to happen? Clients sue.

13 Being a financial advisor at that point, don't  
14 you think that Mr. Kenner would say: You know what? This  
15 is important. Let me bring my lawyer. Let me get a  
16 notary. You keep a copy. I keep a copy. Like a closing  
17 or something.

18 No. No. Goes down, Ken Jowdy's house that he  
19 is renting. Doesn't keep an original. Apparently, Ken  
20 Jowdy is renting a house that has a copier machine. Does  
21 that sound plausible to you? Reasonable? Logical? No.  
22 Bogus.

23 And that's all we got, th document, this piece  
24 of paper saying: Oh, I hereby loan my clients' money to  
25 Ken Jowdy down in Mexico.



Summation - Miskiewicz

5709

1 But it is more than just that. The bogus nature  
2 of the loan agreement.

3 Just before the closing in Lehman in July of  
4 2006 there was a letter to all the members of Little Isle  
5 IV. The one I have that I'm showing you is marked Kenner  
6 Exhibit 70. It came in under many other numbers, I think,  
7 because various people signed the response form at the  
8 end. This one happens to be I think Darryl Sydor.

9 And again, don't get confused about the: Oh,  
10 that is his signature. It may very well be. It is not  
11 the government's contention that every signature is phony.  
12 There is one particular piece of evidence you heard about,  
13 we will get to it, the fund raising agreement.

14 So they signed this agreement. Okay. Terrific.  
15 Where does it say in this document that some of your money  
16 is going to Mexico? It is not there. This would be a  
17 good time. We are doing the stuff. This is the either  
18 the state of the union letter or not the state of the  
19 union letter, I forget how it was characterized by Mr.  
20 Kenner in his testimony.

21 This would be a good time to say: Oh, and by  
22 the way. It is not there. You know why it would be a  
23 good time? Because Ken Jowdy is all over the letter.

24 In the second page of this letter, Ken Jowdy and  
25 Bill Najam, under J&E, that is their holding company or

Summation - Miskiewicz

5710

1 LLC, are referred to as principals in the Cabo San Lucas  
2 project. And they are referred to here as instrumental in  
3 obtaining Lehman's loan commitment. And we look forward  
4 basically to working with them in the future.

5 Perfect timing, contemporaneously, and everybody  
6 would have had it and everybody would have seen it in July  
7 of 2006 to say: Oh, and you know Ken Jowdy. He's part of  
8 this family. This Mexico Hawaii investment family. He is  
9 the guy we have loaned money to down in Mexico. And he is  
10 doing a great job or doing a so-so job. We don't know.

11 Apparently, he was doing a good job, enough to  
12 get 5 percent, 5 percent of the Little Isle IV venture.

13 So Mr. Kenner talks about Jowdy, talks about  
14 Cabo San Lucas, gives him 5 percent essentially of, you  
15 know, the hockey players' money, investment. Doesn't say  
16 a word about any promissory note or loan or the use of the  
17 lines of credit to go down to Hawaii. Not there. You  
18 know why? Because he didn't need to come up with that  
19 excuse. He just needed to hide it.

20 And you know how he hid it? In that same letter  
21 where he is talking about how much money was raised, he  
22 leaves out, pure math, he leaves out \$5 million, which we  
23 now know, through the testimony and through the exhibits,  
24 went to Ken Jowdy. He left it out.

25 He says we've raised 8 million. He didn't raise

Summation - Miskiewicz

5711

1 8 million from the players. He raised 13 million. He  
2 just leaves out the 5 million. He lied to the players in  
3 that letter. At the most critical moment.

4 That's how you know beyond a reasonable doubt  
5 that there was no Ken Jowdy loan. There are was no  
6 reference, no telling of the players: Oh, by the way,  
7 your money is going to go elsewhere. Didn't exist.

8 And what else do we know? Look at Government  
9 Exhibits 4502 and 4503, both of them in evidence. Also  
10 signed, sealed, delivered just at about the same time the  
11 Lehman loan is coming through, just about the same time  
12 that letter is going out saying nothing about the loan.

13 And what do you find out? You find out, what  
14 did that 5 million or however much more or less that  
15 netted out to be, what did it buy Mr. Kenner? It bought  
16 him a 39 percent interest in Ken Jowdy's Cabo San Lucas.  
17 Didn't buy the players a 39 percent interest. Him.

18 And if you read it, you will see that Ken Jowdy,  
19 himself, is only a 40 percent shareholder in the parent  
20 company. Can't get too much closer to being equal  
21 partners. To this day, right now, he is a partner in that  
22 resort. That's where the money went. That's what it  
23 bought him. And on the backs, on the portfolios, of the  
24 hockey players.

25 Now, so far I haven't said much about

**Summation - Miskiewicz**

5712

1 Mr. Constantine. But again, looking at the evidence in  
2 its totality I'm going to submit to you that even at this  
3 juncture, even in the early days of the Hawaii objective  
4 of the conspiracy, there is evidence in front of you that  
5 both Mr. Constantine and Mr. Kenner are deeply, deeply  
6 intertwined financially and, I submit to you the evidence  
7 proved, as coconspirators, as criminal partners, not just  
8 business partners.

9 Remember FBI forensic analyst Chris Petrellese?  
10 I know those charts, some of them are so dense. They were  
11 hard to even see up on the screen. But they are in front  
12 of you now. Take all the time you want to pour over them.

13 Ultimately, what you are going to see, among  
14 other things, and I have portions of one exhibit in front  
15 of you, Government Exhibit 41. It shows that between  
16 December of '04, right around the time the Hawaii venture  
17 is getting off the ground, to March of '06, just before  
18 the Lehman loan comes through, there is already plenty of  
19 financial evidence that Kenner and Constantine are  
20 financially intertwined.

21 Ula Makika and Little Isle IV are sending  
22 millions to Mr. Constantine's CMG or Constantine  
23 Management Group and, to a lesser extent but it is still  
24 there, Constantine sends money back to Kenner in the form  
25 of almost 200, a quarter of a million dollars, almost, to

**Summation - Miskiewicz**

5713

1 GDM33.

2 And remember, GDM33 is Guide Dog, Mr. Kenner's  
3 company. One of Mr. Kenner's LLCs.

4 (Continued on the following page.)  
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**Summation - Mr. Miskiewicz**

5714

1 MR. MISKIEWICZ: (Continuing)

2 So it's there. They're intertwined.

3 You also know it through the testimony, through  
4 the testimony of some of the same hockey players.

5 I don't have this up on the screen, but let me  
6 make reference to it just so you have it.

7 Government Exhibit 723, December 23, 2003. Very  
8 early in the Hawaii venture Brian Berard is sending  
9 \$100,000 to Eufora on the recommendation of Phil Kenner.

10 Michael Peca, at page 413 says that in around  
11 2004 is when he submitted or invested in Eufora. Again,  
12 at the recommendation of Mr. Kenner.

13 Owen Nolan, 2003, put in \$100,000 investment.  
14 Remember Owen Nolan? He says at some point he wanted to  
15 buy a stock in Eufora on the recommendation of Phil  
16 Kenner. And he's doing it around the holidays. And he is  
17 going to have some of that money from -- and some of that  
18 investment he is going to give to his family, his brothers  
19 at Christmastime.

20 And he calls Phil Kenner and he says, Do you  
21 think I could get a certificate, a stock, something, you  
22 know, some nice thing that I can hand to my family at  
23 Christmastime other than the tree to show I'm giving them  
24 this gift, this \$100,000 gift of Eufora.

25 And what does Mr. Kenner tell him? It's not a

**Summation - Mr. Miskiewicz**

5715

1 good time to do that now, not a good time. You can just  
2 write him a note.

3 Imagine a family, Hey uncle Nolan, thanks,  
4 thanks for the empty envelope. 2003 he invests.

5 Steve Rucchin same thing. 2003 he invest in  
6 Eufora at the recommendation of Kenner.

7 Darryl Sydor, January of '04 about \$200,000 he  
8 believed he had invested, again at the direction or at the  
9 recommendation of Mr. Kenner.

10 So there is this financial connection between  
11 the two. And then something very, very significant  
12 happens for your consideration regarding Mr. Constantine's  
13 involvement, knowing and intentional involvement in the  
14 Hawaii object of the fraud. And it begins with what is  
15 referred to as the Urban Expansion Loan.

16 And if you remember, James Grdina -- that's the  
17 guy who said he needed a vowel in his last name -- puts up  
18 money to help purchase one of those lots, the Waika Puna  
19 parcel of land. And they do it through the creation of a  
20 company that Regina (ph) creates with Constantine called  
21 Urban Expansion. It's Government Exhibit 3801, it's in  
22 evidence. You can read the whole thing.

23 And it lays out there who the capital  
24 contributors are, what the relative contributions are  
25 supposed to be from Mr. Grdina and Mr. Constantine.

**Summation - Mr. Miskiewicz**

5716

1 Grdina is supposed to put up three and-a-half million  
2 dollars, and he does. Constantine is supposed to put up  
3 one and-a-half million dollars, and he doesn't. Nothing.

4 Grdina is told that they need a total of \$5  
5 million to close on Waika Puna. They don't. Mr. Kenner  
6 in his examination admitted that's not what they need.  
7 They needed far less than that.

8 But looking at Government Exhibit 3802. In  
9 that, in the note, in the promissory note that Mr. Kenner  
10 signs to get that money from Jim Grdina, they build into  
11 it a prepayment penalty. It says, and this is in  
12 paragraph 3, Borrower may not repay all the principal of  
13 \$3,500,000 US dollars prior to October 15, 2010. This is  
14 October 2005.

15 So any prepayment penalty over the next -- I  
16 mean any payment of the three and-a-half million between  
17 '05 and '010 would automatically result in a \$2 million  
18 penalty. So they have to not only pay off the loan, but  
19 they also have to pay Grdina and Mr. Constantine \$2  
20 million. For what? I asked Mr. Grdina when he was on the  
21 stand. And this is at 2374 and 75.

22 Have you ever seen a prepayment penalty that big  
23 on that amount of a principal loan?

24 Answer: No, I have not.

25 Question: Did you insist on the creation of



**Summation - Mr. Miskiewicz**

5717

1 such a prepayment penalty?

2 Answer: No.

3 Question: Other than Mr. Constantine saying  
4 that to his lawyer in that e-mail -- and the e-mail will  
5 be for you to consider, but he is making reference to an  
6 e-mail about the terms of the agreement here and the  
7 prepayment penalty -- other than Mr. Constantine saying  
8 that to his lawyer in that e-mail which he concedes to you  
9 -- did you have any conversations with Mr. Constantine  
10 about, Hey, we should get, you know, a 66 percent,  
11 thereabouts, prepayment penalty?

12 Answer: No, I did not.

13 So in other words, there is only two people  
14 coming up with the Urban Expansion Loan, actually only one  
15 person coming up with case, and that's Jim Grdina, he is  
16 not asking for an essentially 66 percent prepayment  
17 penalty, it's all Tommy Constantine.

18 And where is that money going to come from?  
19 Right. This is Kenner agreeing to pay not only back the  
20 three and-a-half million, but Kenner agreeing, oh, if it  
21 gets paid off in the next five years I'm going to pay you  
22 two million. Where is that money going to come from? He  
23 doesn't have it. It is going to come from the hockey  
24 players. Or it's going to come from Lehman Brothers or  
25 whatever it was that they were looking at at the moment to

**Summation - Mr. Miskiewicz**

5718

1 develop Hawaii. It's diluting the equity that the hockey  
2 players did intend to put in for Hawaii. It's baking into  
3 this fraud a way of basically stealing \$2 million for  
4 nothing. Nothing, which is exactly what Mr. Constantine  
5 puts into it.

6 And you know Mr. Kenner knew that the Lehman  
7 loan was pretty much imminent. It would not get closed  
8 for another, a lit less than a year.

9 But as he testified at page 4307 to 09, at the  
10 time of the proposed Lehman closing in the summer of '05,  
11 that's before the Urban Expansion Loan, before this \$2  
12 million crooked prepayment penalty is cooked into the  
13 books, he knew. In fact, he felt that he was going to  
14 close in the summer of '05. And yet he goes ahead and he  
15 cooks this with his partner Tommy Constantine into the  
16 Urban Expansion Loan. And he goes on. And he says, there  
17 were problems, and things happened. And in the eleventh  
18 hour I told Lehman, you know, I'm not going through it.

19 But he knew in '05 before he signed the Urban  
20 Expansion promissory note that the money would be coming?  
21 What did he think? That Lehman -- he's going to back off  
22 of Lehman and just wait for another five, six years and  
23 not invoke the prepayment penalty? Of course he knew.  
24 Common sense dictates he knew. Beyond a reasonable doubt  
25 he knew, and of course Tommy Constantine knew because he

**Summation - Mr. Miskiewicz**

5719

1 was getting the big chunk of money. And again, for what?  
2 Zero dollars that he put in.

3 Phil Kenner signed that promissory note,  
4 Government Exhibit 3802, October 14, 2005. In other  
5 words, months after he was this close to closing with  
6 Lehman. And you heard that, you know, he continued to  
7 look for other investors to replace Lehman.

8 And then look at the settlement agreement. I'm  
9 not going to bore you with all of the financial records.  
10 But there it is in black and white. This is the  
11 settlement statement when Lehman Brothers does come along.  
12 And there is the payment for Urban Expansion, \$6,935,000  
13 and change to Urban Expansion.

14 Out of that \$2 million goes right to Tommy  
15 Constantine for no reason at all. \$2 million that could  
16 have been used for Hawaii. \$2 million that didn't have to  
17 be wasted, diverted, wasted for the players, diverted away  
18 from the players, diverted to Kenner and Constantine.

19 And look at, I believe there is a Chart 7. Look  
20 at the flow of the money. Special Agent Josh Wayne, you  
21 remember Josh Wayne's charts and carts. And these are  
22 representations of a lot of documentation,, all of the  
23 documentation that backs up these charts will be there for  
24 your consideration.

25 But look at how this money flows. The \$6.9

**Summation - Mr. Miskiewicz**

5720

1 million goes to Urban Expansion. The \$2 million goes to  
2 Constantine, over \$2 million. And then from there,  
3 Constantine spends it on things like Playboy and his car  
4 racing business. And then look at where the rest of the  
5 money goes. Some of it goes to pay for Mr. Kenner's  
6 ex-wife's house. And some of it, just \$419,000 just goes  
7 to pay off personal loans that Mr. Kenner has.

8 So he benefits even from this crooked deal, is  
9 the only way I can describe it. Crooked, \$2 million  
10 dollar prepayment penalty in Urban Expansion. Why? There  
11 was absolutely no reason for it. Certainly the players  
12 knew nothing about it.

13 There is another loan related to the Hawaii land  
14 venture. And it has to do with, again, the fact that  
15 money has already been diverted. And now more money is  
16 needed.

17 What happens? At about the time of the Centrum  
18 loan in December of '04, actually before the Centrum loan  
19 the players put up 3.4, almost \$3.5 million to buy a  
20 parcel of land called Honu'apo. And again, Honu'apo is in  
21 the middle of those three parcels in Government 945.

22 Now this is what they thought all of their money  
23 would be used for. Their lines of credit would be drawn  
24 down, and it would be used maybe to purchase some land, or  
25 maybe used to build infrastructure, or whatever. Look at

**Summation - Mr. Miskiewicz**

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1 what happened.

2 Kenner admits at page 4637 that that Centrum  
3 loan money was part of the 5 million he sent down to Ken  
4 Jowdy. That is not what any of those men agreed to. And  
5 what did they have to do, or what was going on at this  
6 time? They were already highly indebted to Northern  
7 Trust. Every single one of those men are.

8 Owen Nolan has over \$2 million in the ring. And  
9 the deal makes no sense. They have to take a 12 percent  
10 loan from Centrum. The players are already paying six  
11 percent on their lines of credit. That's 18 percent.  
12 There is no other way to characterize it on the same  
13 money. They should just own Honu'apo. Instead they have  
14 this debt. Why? So that Mr. Kenner can shovel more money  
15 to his partner Ken Jowdy in Mexico.

16 And again, Special Agent Wayne showed you  
17 through one of the charts, I believe it's kind of small to  
18 read. I think this is Chart 4.

19 They end up mortgaging Honu'apo. And look where  
20 the money goes. It goes to Mexico, obviously. And it  
21 doesn't just go through Mexico, it goes through a series  
22 of companies all controlled by Kenner, which you will see  
23 time and time again that money, which I submit to you is  
24 not only important for the overall wire fraud conspiracy,  
25 but also important because it's part and parcel of how the

Summation - Mr. Miskiewicz

5722

1 money was, or financial transactions were designed to  
2 conceal where the money went. It's part of the money  
3 laundering. And of that there is Tommy Constantine again  
4 getting \$650,000 out of the Centrum loan. For that? For  
5 what? For nothing. Pure fraud.

6 And what does he get out of it? The Palms.  
7 We'll talk about the Palms later, because you heard a lot  
8 about the Palms units, the condos. He gets money to buy  
9 this unit. It's night nice if you like that kind of  
10 stuff. He gets that.

11 What do the players get? Red ink, debt,  
12 nothing, stolen money. That is what they get. He gets  
13 that, they get that.

14 I believe that Judge Bianco in instructing you  
15 on how to evaluate if the evidence is sufficient to show  
16 that there is a conspiracy among two people alleged to be  
17 co-conspirators, we'll say, will charge you that among  
18 other things that actions often do speak louder than  
19 words.

20 And if you look at the Centrum loan, I can not  
21 think of a more perfect example of proof beyond a  
22 reasonable doubt -- actions speak louder than words -- no  
23 reason to mortgage Honu'apo parcel. No reason other than  
24 for Kenner to get his 39 percent. Because remember, this  
25 is happening at the same time as, you know, some of the

**Summation - Mr. Miskiewicz**

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1 other transactions we have already talked about. To get  
2 his piece of the pie, that resort in Cabo. No reason.  
3 Actions speak louder than words. And in this case the  
4 action is pure fraud.

5 Your Honor, may we take a brief break?

6 THE COURT: Yes, we'll take a recess.

7 Don't discuss the case.

8 (A recess was taken.)

9 (After recess.)

10 MR. LaRUSSO: Your Honor, while we're waiting,  
11 the Internet is down. If someone can restart it? I was  
12 just wondering.

13 THE COURT: We'll check. Did this just happen  
14 this morning?

15 MR. LaRUSSO: This morning. Thank you, your  
16 Honor.

17 (The jury entered the courtroom.)

18 THE COURT: Okay, Mr. Miskiewicz.

19 MR. MISKIEWICZ: Thank you, your Honor.

20 Very briefly to pick up where I left off.

21 Actions speak louder than words.

22 In the indictment it is alleged that among the  
23 other manner or means by which Phil Kenner achieved the  
24 objectives of the conspiracy, at least insofar as the  
25 Hawaii portion of the fraud, is by concealing the amount

**Summation - Mr. Miskiewicz**

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1 of debt that had been wracked up by him on the backs of  
2 the hockey players.

3 Look at those numbers. But for Urban Expansion,  
4 a substantial portion of that debt could have been paid  
5 off. But for Centrum, again, a substantial portion of the  
6 debt could have been paid off.

7 You heard testimony that, yes, after the Lehman  
8 loan everybody got back a little butt. But immediately  
9 their lines of credit went back up.

10 And remember Aaron Mascarella, the former  
11 executive at Northern Trust? At page 8 he is asked.

12 Question: What if anything did Mr. Kenner  
13 instruct you about where the monthly statements for the  
14 lines of credit would go?

15 Answer: He wanted us to send them to his  
16 personal residence.

17 And you know then the FBI and IRS executed an as  
18 warrant, search warrant at Mr. Kenner's house, they found  
19 it, many of those records.

20 And why is that significant? Well, some  
21 statements, some records did slip through the cracks. I  
22 think you heard testimony that some records were mailed to  
23 Mr. Peca and Mrs. Peca's former or temporary residence  
24 when he was moving from one team to another. I believe  
25 Mr. Ranford admitted that some of the lines of credit



**Summation - Mr. Miskiewicz**

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1 statements that came in evidence here had been mailed to  
2 his summer address in Vancouver. So some, there were  
3 cracks, this was not perfect, this concealment. But look  
4 at, again, what Mr. Kenner does to conceal the debt that  
5 he is loading onto his players.

6 This is an e-mail, difficult to read maybe. I'm  
7 not going to go over it line by line, what it says. But  
8 it came in as a Kenner Exhibit in cross-examination of Joe  
9 Juneau. He was the first person to confront his former  
10 team mate and RPI classmate and now financial advisor in  
11 this e-mail in 2007.

12 And he says, Phil, what is this Northern Trust  
13 letter we just received? It says that my line of credit  
14 -- he goes on -- secured by N T I M A S, is now 53 days  
15 late. It says, advance of default. What is this? Please  
16 explain.

17 What does Kenner say? Again, you can kind of  
18 look at the bottom, and work your way up in reverse  
19 chronology. He says, I paid off the LOC, meaning line of  
20 credit. It's all good.

21 How did he pay it off? He just shifted money  
22 from Owen Nolan's account to pay it off. That's all. He  
23 didn't pay it off, Owen paid it off because Joe Juneau,  
24 probably the longest person he had a relationship with,  
25 Kenner had a relationship with, started asking questions.

**Summation - Mr. Miskiewicz**

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1 And from that moment on, what else do we know?

2 Well, look at the -- he was asked, Mr. Juneau,  
3 about the extension of credit in the first place. Because  
4 in that email and others he said that he was unaware that  
5 he had a \$500,000, \$750,000 line of credit.

6 Government's 2155. This is the statement of  
7 purpose for an extension of credit secured by margin  
8 stock. This is secured by Mr. Juneau's portfolio. And  
9 he said he signed it at the bottom there.

10 But then he was asked a series of other  
11 questions about the center portion, part 1. He was asked.

12 Regarding the \$500,000, what is the amount of  
13 credit being extended? In handwriting it says, \$500,000.  
14 He was asked, Is that your handwriting?

15 And at page 170 he said, No.

16 Do you see there is two lines, still on  
17 government's 2155.

18 Do you see there is, two lines down, it says, If  
19 the answer is no, describe the specific purpose of the  
20 credit.

21 Do you see that?

22 Answer: Yes.

23 What does it say?

24 Real estate investment.

25 Question: Is that your handwriting?

**Summation - Mr. Miskiewicz**

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1 Answer: No.

2 Question: Mr. Juneau, did Mr. Kenner ever tell  
3 you that you were putting in \$500,000 dollars into the  
4 Hawaiian deal.

5 No, never. Page 170.

6 And just remember, Little Isle IV for a period  
7 of time had its own line of credit secured by Owen Nolan  
8 and Juneau. And here he is saying, I have no idea.

9 And you know he had no idea because in 2007 when  
10 he is e-mailing his financial advisor, his friend. He  
11 says, What's this about?

12 And his friend says, It's all good. I paid it  
13 off.

14 I? He paid nothing, Owen Nolan paid it off.

15 Although frankly Owen Nolan didn't even know he  
16 paid it off. And how do we know that? I'm not going to  
17 go through every one of these charts. This happens to be  
18 Government 33 in evidence. But what I would submit to you  
19 is essentially the Ponzi scheme portion of the Hawaiian  
20 fraud.

21 And we charge in the indictment, the government  
22 alleges in the indictment that there was a period of time  
23 in which Mr. Kenner engages in these series of  
24 transactions again and again and again. They are again, I  
25 submit to you, relevant for purposes of the money

**Summation - Mr. Miskiewicz**

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1     launders conspiracy, but also how he conceals what's  
2     going on.

3             Because look at the utter ridiculousness of  
4     these transactions. Glenn Murray's line of credit. Owen  
5     Nolan, Sergei Gonchar. Hey, I like GSS, there is no  
6     problem. My wife's got Playboy, everything's cool. Even  
7     he gets ripped off here. Steve Rucchin.

8             And in some cases remember the testimony was  
9     that the yellow in the box to the right represents people  
10    whose lines of credit is both being paid off and borrowed  
11    against at once. It's ridiculous. It's like taking your  
12    American Express and borrowing against it to pay off your  
13    MasterCard interest payment, just interest.

14            And this goes on, and on, and on, until there is  
15    no more money. And now Mr. Kenner has to start drawing  
16    down whatever he can because there is no more money to  
17    pay. And that is what really causes the house of cards to  
18    begin to fall in 2009, in 2009 when the letters of default  
19    start coming out to the hockey players. And they  
20    certainly got all of those for the first time.

21            And you heard player after player saying, you  
22    know, I came home from this trip or that trip and/or it  
23    came in the mail and we were astounded. We had no idea.

24            Did they just forget? No. They were lied to.

25            They were concealed, or I should say the amounts

**Summation - Mr. Miskiewicz**

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1 to which they were placed in debt was concealed from them.

2 And again, let me say this. If there is any  
3 suggestion in your part during your deliberations that  
4 this is just, you know, the government wants a conviction  
5 or something like that because people lost money in a real  
6 estate deal, read the indictment again. Go back to Judge  
7 Bianco's chart. That is not an issue.

8 Capitalism sometimes results in losses,  
9 sometimes big losses. Certainly Lehman, we know has lost.  
10 The difference here is, operative or material thefts were  
11 concealed from these people. And that is why, and that is  
12 why they didn't do anything for years, 2003, four, five,  
13 six, seven, eight, nine, nothing. Why? Because they had  
14 no idea. And that's what makes it a fraud. They were  
15 lied to.

16 Now there is evidence regarding a forgery. And  
17 it relates to Government Exhibit 5104. If you will recall  
18 the testimony that refers to John Kaiser about this  
19 document. He did say funding consulting agreement.

20 It purports to give Little Isle IV, who remember  
21 is controlled by Phil Kenner, basically agreeing to pay  
22 Constantine Management Group, one of the co-conspirator's  
23 various companies, CMG, a consulting fee for fundraising,  
24 fundraising regarding -- for what? And there are two  
25 agreements here, one was purportedly signed in December of

**Summation - Mr. Miskiewicz**

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1 '04. And the other one was signed in June of '05.

2 So you must -- first of all I think you can  
3 consider does that somehow explain and give reasonable  
4 doubt to the allegations of fraud? Because after all  
5 there is this agreement. This is one of those areas where  
6 I want to suggest to you there was a lot of time spent  
7 talking about basically a deception.

8 This document, through the expert testimony,  
9 through John Kaiser's testimony and through the  
10 circumstances under which it was purportedly signed, I  
11 submit to you prove beyond a reasonable doubt it's nothing  
12 but a forgery, a fraud.

13 When it was created, who knows. But consider a  
14 number of important relevant facts regarding this  
15 agreement. It is signed by, among others, John Kaiser.

16 John Kaiser didn't control the money for any of  
17 either the Constantine corporations or the  
18 Kenner-controlled corporations. Why would he care? And  
19 for that matter, what authority would he have to commit  
20 player money to pay Mr. Constantine supposedly for raising  
21 money? None.

22 And it's not just Mr. Kaiser who said it.  
23 Government 103, an e-mail from Phil Kenner to Michael  
24 Stolper. This is back, this is years later. And I'm  
25 going to talk about the Stolper investigation or whatever

**Summation - Mr. Miskiewicz**

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1 that was later -- but he says in the excerpted part of  
2 this e-mail.

3 I'm not sure that Kaiser ever signed an  
4 agreement with Constantine on behalf of Little Isle IV,  
5 LLC. Kenner was the managing partner, a managing member  
6 of Little Isle IV, LLC not Kaiser. Kaiser has never been  
7 a member of Little Isle IV, LLC.

8 So he had his own e-mail. John Kaiser has no  
9 control to contract Little Isle IV with Constantine. He  
10 is a third witness. You know what he is? He's a New York  
11 City cop. And he's a good -- hey, let's get the cop who  
12 is also our builder now that the FBI and others are  
13 snooping around about what we're doing, let's put his name  
14 on it. That is what that is.

15 You heard from an expert, a handwriting expert  
16 John Osborne. It's at page 3627 he gives you his opinion.

17 With respect to each of the two signatures it is  
18 my opinion that it is highly probable that the signatures  
19 are attempted simulations not genuine signatures of John  
20 Kaiser.

21 And Judge Bianco will instruct you as to how to  
22 evaluate an expert's opinion.

23 Remember, this was what he was looking at. And  
24 he gave you his reason. It's in the record. I'm not  
25 going to repeat it. But the jitteriness of the

**Summation - Mr. Miskiewicz**

5732

1 handwriting, among other things, which frankly you know  
2 you'll have the exhibit and you can look at it. You can  
3 make your own assessment.

4 Judge Bianco will tell you that you're to  
5 evaluate that witness like anybody else. And among the  
6 things to look at are what are his qualifications. Well  
7 you heard what his qualifications are and it's in the  
8 record.

9 Does he have an interest in this case? And he  
10 testified that he has been in the business for years.  
11 It's a family run business. He has testified for  
12 plaintiffs, for civil defendants, for criminal defendants,  
13 and for the government. He has no interest in the outcome  
14 of this. That was his opinion.

15 Something very also very, very important to  
16 remember about that consulting agreement which I submit to  
17 you proves beyond a reasonable doubt that it is a fraud.  
18 It is a fraud to further the goals of the Hawaiian  
19 objective of the conspiracy. And it's this.

20 Kenner testified that as with both the December  
21 '04 and the June '05 agreements, he and Mr. Constantine  
22 signed them in Scottsdale, Arizona on or about the dates  
23 set forth therein. And then as to both he said, John  
24 Kaiser wasn't around so I had him sign and essentially  
25 backdate it the next time I went to Hawaii on a



**Summation - Mr. Miskiewicz**

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1 quote-unquote, due diligence trip to Hawaii.

2 And among other things he was asked at page  
3 4306, Are you able, Mr. Kenner, to recollect the day that  
4 occurred?

5 And specifically in this portion he is talking  
6 about the June 1st of 2005 agreement in which he claims  
7 that he had John Kaiser sign it. And he says, No, I am  
8 not. I am not able. In other words, to recollect.

9 John Kaiser could. And I submit to you it  
10 defies logic, the story about he went to Hawaii on among  
11 other dates the June '05 agreement. You know why?  
12 Because John Kaiser lost, his wife had just lost a baby in  
13 June of that year. He testified he was still out of  
14 commission at home June and July of that year.

15 In fact July is when he said he got that call  
16 about the Hawaii \$1 million loan I mentioned earlier this  
17 morning. He was still at home in Suffolk County when he  
18 got that phone call. He remembered where he was.

19 And he was asked, Were you anywhere in Hawaii at  
20 that time?

21 No.

22 Or Scottsdale Arizona?

23 No.

24 Kenner lied, pure and simple. He forged, or  
25 somebody forged that signature to give it some patina of

**Summation - Mr. Miskiewicz**

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1 legitimacy, because they needed a third a person to sort  
2 of say, Oh, we're all one big happy family, right, John?

3 It's a forgery. Actions speak louder than  
4 words.

5 Why do that? Other than you need now, whenever  
6 this was created, and I submit to you it certainly wasn't  
7 created on the dates set forth in these agreements. The  
8 only reason you do is this is, again to create a hall of  
9 mirrors, you know, get the FBI and the IRS off your tail.

10 Hey, one of your own, a cop, he signed the  
11 agreement. Must be okay, right? A forgery. And there  
12 is only one reason to do it. There are only two people  
13 who benefitted from it. The reason was to continue the  
14 concealment, to continue the conspiracy. The only two  
15 people would benefitted from it was Phil Kenner and Tommy  
16 Constantine. And you saw in black and white the numbers  
17 through Urban Expansion and the Centrum loan as to how  
18 they benefitted.

19 I'll talk just very briefly about one shorter  
20 aspect of the Hawaiian fraud, and then we're going to move  
21 on.

22 Discovery Harbor Lots. That is, you recall, a  
23 small portion of land within the area of Waika Puna and  
24 Honu'apo. Pure theft.

25 The money for Discovery Harbor Lots comes out

**Summation - Mr. Miskiewicz**

5735

1 March 24, '05 from Brian Berard's line of credit. Goes  
2 through Big Isle IV, and it goes to the Fidelity National  
3 Title Company.

4 And years later, now in 2013 the real estate  
5 market has crashed. Whatever Discovery Harbor Lots was  
6 worth, it's certainly not worth the money that was stolen  
7 from Brian Berard's line of credit. But it sold.

8 And where does the money go? It goes back to  
9 Mr. Kenner. Actually goes through Mr. Kenner's son's bank  
10 account, out of which he then makes a series of  
11 withdrawals. Which he says, he admitted he did on the  
12 advice of Chase Bank employees to avoid the filing of a  
13 currency transaction report.

14 Remember he testified about that. You know, if  
15 he withdraw \$10,000 or more he would have to file a  
16 currency transaction report. And the bank teller  
17 suggested, maybe you don't want to do that. You know, I  
18 could be here for nine weeks talking about the lies  
19 Mr. Kenner testified to. Let me just give you one.

20 See where it says \$9,500 and \$9,000 both on  
21 April 9, 2013?

22 You know, you remember what he said? He said, I  
23 went to the bank teller and I wanted to withdraw more than  
24 \$10,000. And the bank teller asked me, Do you really need  
25 all of that money in one day?

**Summation - Mr. Miskiewicz**

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1 And I said, No. No, I'm good. I don't need --  
2 whatever it was that he wanted to withdraw.

3 So that is yes told you it was the bank teller  
4 who told him how to avoid the currency transaction report.  
5 Black and white, it's a lie. Oh, one day, the very day,  
6 the first day when he says, I went there and you know I'm  
7 asked do I really need all of the money and no, I don't.  
8 Yes, he did.

9 Because he either went around the block, or went  
10 to a different branch. Because the same day he withdraws  
11 another \$9,000, on the same day. How do you square those  
12 two statements? She told me, whoever this teller is, she  
13 told me how I could avoid a currency transaction, and  
14 since I didn't need the money -- Yeah, sure I'll take the  
15 money.

16 And on the same day he is back and withdrawing  
17 the same amount of money. A lie. A bald-faced lie  
18 about, granted a small portion of the overall fraud. But  
19 this is something that you rightly can take into account  
20 in assessing his testimony.

21 By the way, it's not just Brian Berard whose  
22 money is stolen for the Discovery Harbor Lots. There were  
23 several of them. Another one is, comes simply right out  
24 of Darryl Sydor's line of credit. And again, it's the  
25 same pattern. The money comes in, the money comes out of

**Summation - Mr. Miskiewicz**

5737

1 the line of credit for \$200,000.

2 I suppose if it stopped right there, one could  
3 say, well, this is what Hawaii was intended for. This is  
4 what the lines of credit were intended for. Brian Berard  
5 and Darryl Sydor are helping Little Isle IV to purchase  
6 land out of their lines of credit. Fine.

7 But it doesn't continue. It goes from Little  
8 Isle IV to another company, which again I think we should  
9 take into account and consider with respect to the money  
10 laundering charge. And then a portion, actually \$86,000  
11 of that \$200,000 goes again to the title company. And  
12 then the same pattern, years later, real estate crash, he  
13 sells it, he keeps the money. And then pulls it out in  
14 two cash withdrawals.

15 And again, back to the, the state of the union  
16 or not state of the union letter in July 2006. This is  
17 the letter to all of his members -- this one I'm holding  
18 up is Kenner Exhibit 93 -- you know, page 1 lists all of  
19 the properties that are part of the Hawaii venture.

20 Little Honu'apo, Honu'apo, Waika Puna, Moaula --  
21 sorry -- church, and the various percentages. There is no  
22 Discovery Harbor, no Discovery Harbor. No way Brian  
23 Berard or Darrel Sydor, even if they knew about what was  
24 happening to their line of credit, could trace this  
25 portion of the fraud.

**Summation - Miskiewicz**

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1 (Continued from the previous page.)

2 Totally concealed. Totally concealed.

3 Let's talk about Eufora. And again it may very  
4 well be a good idea. No question patents were obtained.  
5 The issue here is what did any of these people get for the  
6 money that they were induced to part with? I submit to  
7 you this object of the fraud which really takes hold in  
8 late '08 through '09 and also dovetails with the  
9 substantive wire fraud counts really shows how these two  
10 men Kenner and Constantine are working hand in hand, not  
11 as business partners but partners in crime.

12 We know from prior testimony in the deposition  
13 that Mr. Constantine gave, you'll have the entire  
14 deposition to read, those portions that were admitted, but  
15 Government's Exhibit 8021-R, a portion of it, you can read  
16 it for yourself, but he says in sum and substance when  
17 he's asked what Eufora is, one of his answers is, really,  
18 I mean, I was going to say it's not worth mentioning but I  
19 mean in the sense that it's not a profitable endeavor.

20 Was it at some time?

21 No, it never has been to date.

22 When does he say that? April 23, 2009.

23 Jumping ahead you can talk about the Global  
24 Settlement Fund in a little while, it's right at the same  
25 time he's both getting other people involved in Eufora and

Summation - Miskiewicz

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1 pitching some of the same victims to get involved in the  
2 Global Settlement Fund. You know, in his own words, it's  
3 not much to talk about.

4 This came in relatively late in the trial.  
5 Government 4717, Mia Edrozo you heard from I believe Mark  
6 D'Ambrosio, who she was. This is March of '08, the  
7 subject line. Please respond. Negative operating  
8 balance. We have no float, no cash, no operating money.  
9 The operating balance later in the e-mail is negative  
10 18,000.

11 Kenner knows what is going on. At about the  
12 same time, there's an entire book of text messages that  
13 were admitted. You can look at them. I'll not go over  
14 every one. These themselves told an incredible story  
15 about a close relationship with the most intimate details.

16 During the testimony you heard, you know,  
17 Mr. Constantine is telling Kenner about his girlfriend or  
18 wife's credit card bills and the need to come up with  
19 money and Kenner responds and helps him out, and there is  
20 text after text like this.

21 April 8, 2008, about the same time, a little  
22 after, that Mia Edrozo, says we have no cash, nothing. In  
23 green, there is Constantine saying -- I'm sorry, PK, Phil  
24 Kenner in green and that is the color throughout all of  
25 those texts, Mr. Kenner is communicating in the green

**Summation - Miskiewicz**

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1 "bubbles" telling him about moneys he just sent to his  
2 account.

3 On that day, April 8, 2008, \$100 it says is in  
4 your account. Please call me about the Palms, PK.

5 Look at what happens to Michael Peca's line of  
6 credit right about that same time. Actually one day  
7 early, not \$100; 100,000 is invested but not in Eufora.  
8 CMG, which again in those depositions you are going to  
9 hear, you'll read Mr. Constantine made all kinds of  
10 references to it essentially just a personal, you know,  
11 bank account essentially, not something that is related to  
12 Eufora, not what you heard in the last couple days somehow  
13 the repository of a private stash of stock in Eufora.  
14 It's something to separate his business accounting firm.

15 And, I mean, look at that. The 100 is in your  
16 account. Look at what happens to Michael Peca. You know,  
17 thanks, Mike.

18 Another series of texts in April of 2008, and  
19 there are several of them here, I'll not read them. Going  
20 on about -- it says \$17 for Hilton and you heard who  
21 Hilton was, the guy that Mr. Constantine owed money to for  
22 one of the properties. And a Florida lawyer that he needs  
23 44, and it goes on like this, back and forth with ABA  
24 numbers transmitted, 25 to 40k, you know. He's even asked  
25 on April 24, 2008, Constantine asks: Is that Eufora



**Summation - Miskiewicz**

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1 money? And Kenner says yes. And look at what happens to  
2 Tyson Nash's money, same period of time, April of '08,  
3 100,000 goes in, goes into CMG, not Eufora, and then where  
4 does the money get blasted out to? Compare this text with  
5 the money trail and you'll see that 17,000 went to Kenner.

6 The 40,000 went to Wampler Buchanan Walker, a  
7 law firm for one of Kenner's many lawsuits unrelated to  
8 Eufora.

9 It goes on: I need 30k tomorrow. Dude, I  
10 really have to spend the next week, I'm paying all of my  
11 bills, there's racing, Cabo, Eufora. It goes on. There  
12 are transactions, you will see, Mr. Ranford, Mr. Sydor,  
13 his money going out to Playboy. It has nothing to do with  
14 Eufora.

15 Again, Eufora was just an excuse, a deception,  
16 an object, a way of stealing more money at a point in  
17 which they desperately need money.

18 Dude, that's just half of the story. I have so  
19 many people up my ass right now. And then enter Tim  
20 Gaarn, a guy from New Jersey who testified here under the  
21 terms of an immunity or given immunity against prosecution  
22 and Judge Bianco will instruct you how to evaluate such  
23 agreements and such testimony.

24 But in sum and substance, Tim Gaarn testified  
25 that as a favor to Phil Kenner who had loaned him a lot of

Summation - Miskiewicz

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1 money over the years at a point in his life when he was  
2 unable to pay his own bills, about to be foreclosed on on  
3 his property in New Jersey, he agrees to become the person  
4 who runs one of these subcompanies, Standard Advisors,  
5 will take the stock owned by Standard Advisors in Eufora.  
6 Why does he do it?

7 Kenner asked him to do it and he had done him  
8 many favors in the past. Does he think on the stand that  
9 he had committed a crime? That's for you to evaluate.

10 Certainly he testified here under the terms that  
11 nothing he said could be used against him, but the bottom  
12 line is what does he do?

13 Through Tim Gaarn, and remember he testified  
14 that document that was dated 2005 when he has supposedly  
15 inherited all the shares of Eufora was false. He actually  
16 signed it just days before he opened the bank account in  
17 Wachovia through which all this money flowed, and you saw  
18 the bank records, that account opens late December of '08,  
19 and that's when the money starts flowing.

20 First, right about this time, December 30, 2008,  
21 the same date Gaarn is opening up his Wachovia account,  
22 give or take, he may have opened it up December 31st, I  
23 don't recall, but it is in evidence.

24 Constantine: Can you wire CMG a little dough?  
25 It is negative 220 -- I think it is a fair inference from

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1 the way these men talked to each other and the financial  
2 records when they say negative 220, they are not talking  
3 \$220, they are talking \$220,000.

4 Now we know here that Mr. Kenner having been  
5 very generous to Mr. Constantine is suddenly also running  
6 into financial difficulties. Wells Fargo has pulled the  
7 plug on me. And they go on.

8 What happens? 100,000 comes into Eufora from  
9 Glen Murray and goes out, almost within -- well, within  
10 two days through Gaarn. And from there look at the  
11 nature -- and this is typical of so many of these  
12 transactions -- some money goes directly to Kenner but  
13 then some of it gets shifted back to CMG and it is all  
14 used to pay Kenner expenses.

15 January 2009, Mr. Gaarn is two weeks on the job  
16 of basically being the guy through which all the money  
17 will get funneled.

18 Government's 7446, look at what -- this is a  
19 fascinating text among many. Remember the shopping lists  
20 that John Kaiser said Kenner had given him about where all  
21 of his money was? Couldn't really give him a document,  
22 couldn't give him a stock certificate, all he could give  
23 him was a shopping list, basically handwritten notes.  
24 Here's, you know, here's a text version of that. You can  
25 see Kenner, you can almost read Kenner's frustration. 850

**Summation - Miskiewicz**

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1 for CMG, 17,000 for Avalon, 3350 for Hunter. These are  
2 all debts that Constantine had and debts that Kenner  
3 helped him get out of.

4 You can see, by the way, I submit to you, the  
5 beginnings of the strain of this conspiracy, and there is  
6 strain, never ends, and I'll get to that at the end,  
7 doesn't end, but there is strain because now they are both  
8 in trouble. This is January of 2009, the lines of credit  
9 are about to be called in on default. He knows it, he has  
10 all the records in his house (indicating). His back is up  
11 against the wall.

12 Call me about Gonchar. Can you spot me some  
13 travel food money?

14 They are dying for cash, they are running out of  
15 cash, and that's why Mr. Gaarn is so helpful to these  
16 co-conspirators, whether he thinks he's a co-conspirator  
17 or not is for you to decide.

18 Count 2 which is a wire transfer that occurs,  
19 this is a substantive charge, not part of the conspiracy,  
20 but both Kenner and Constantine are charged with this on  
21 February 12, 2009.

22 This is Count 2, and more specifically, if I can  
23 use this, that is really Count 2. Money goes to Eufora to  
24 Gaarn and then money goes to Kaiser. What did Kaiser tell  
25 you about this? This is the point at which he's working

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1 on another project. Remember he talked about Hermosa  
2 Beach, talked about a million dollars that supposedly went  
3 to Hawaii, comes to find out it went somewhere else to  
4 Mexico, doesn't get that money back. He works on the  
5 Hermosa Beach, California. At the closing he doesn't see  
6 anything but about \$300,000 from the profit of that.

7 Then there's another project in Scottsdale,  
8 Arizona, and this is the point where he's running out of  
9 his own cash and says I need money to complete this job,  
10 Phil. And look at the way the money flows? It goes from  
11 Gaarn to Kaiser and then Kaiser says I need -- Kaiser told  
12 you that he was then, after he was given the money, he  
13 immediately has to transfer it back to Kenner because  
14 Kenner said, oh, something along the lines he needed it  
15 back for whatever reason. That is Count 2.

16 The fact that Kaiser is in essence a victim here  
17 and is sending the wire transfer back to Kenner, I submit  
18 to you -- well, Judge Bianco will charge you on the law on  
19 this, but in essence that is the wire transfer and it goes  
20 from Gaarn to Kaiser's account here in the Eastern  
21 District of New York which here you also have to find  
22 venue and Judge Bianco will instruct you on that and what  
23 the relative elements of that are. But that money, that  
24 wire transfer comes back here, touches at least the  
25 Eastern District of New York through John Kaiser's bank

**Summation - Miskiewicz**

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1 account here. It is part of a flow of money that  
2 essentially is just ripping off Greg DeVries and Bill  
3 Ranford, and follow the money further on because it is  
4 relevant to the money laundering.

5 Kenner's expenses are paid but, you know, if you  
6 were to track the various things that he spends money  
7 there, you would go back and see it comes from Tim Gaarn,  
8 doesn't look like it is related to Eufora. It's a  
9 concealment. The same is true using a portion of it from  
10 Kaiser, another concealment.

11 Count 3, a few days later, February 26, 2009.  
12 Now it is Steve Rucchin's turn to get ripped off. First  
13 the money goes to Eufora, then to Gaarn, it gets blasted  
14 out in all directions but again I will submit to you that  
15 this is where Count 2 comes in because the money then,  
16 here it is in the Eastern District of New York, it is  
17 Kaiser's account and then he's told, hey, John, told by  
18 Kenner, I need that money back, and he does it. Kaiser is  
19 not involved in ripping anybody off. The guy is a builder  
20 and he's building a home that he's doing as part of  
21 another deal, a legitimate house flip with Mr. Kenner.

22 Look at the overall picture. The only reason to  
23 do this is to hide where the money is coming from and  
24 where it is going.

25 Count 4, May 22, 2009, Bill Ranford's turn

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1 again, another \$100,000. By the way, do you remember  
2 Ranford, it's 2009, he's a coach now. In his words in sum  
3 and substance he said I'm not making NHL money at this  
4 stage. Two wire transfers within a matter of weeks at a  
5 point at which he's essentially retired now, he has to be  
6 careful how he spends money and putting money in a company  
7 that says Mr. Constantine says is not really worth much.  
8 Of course Bill Ranford doesn't know that.

9 Who controlled Ranford's bank account? Kenner  
10 did. Now, that line from Kenner down to that box on the  
11 lower right-hand corner shows now this time Kenner is  
12 sending money to Kaiser and it is his expenses. Again  
13 Kaiser is building something, he's not involved in this,  
14 but again the causing of that wire which again touches the  
15 Eastern District of New York, that is Count 4.

16 Then we get to Nick Privitello, December 7,  
17 2009, the day that Mr. Privitello has to go down in  
18 history as a day that will live in infamy, his sense of  
19 infamy, because as you recall he got nothing, and the  
20 indictment charges as to Mr. Privitello's Eufora losses.  
21 It's not just that the money was diverted but that he was  
22 simply just disavowed. It's like they took his money and  
23 they said what money?

24 The defendant knows about, both defendants know  
25 about Privitello. Here they are again going back and

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1     forth. This is November 13, 2009, just before the  
2     Privitello wire, right about the time that Eufora  
3     allegedly got some sort of terrific deal with MetaBank and  
4     it was going to be great. And what does Kenner say in  
5     response? I'll yell MetaBank as I kick Nick in the balls.  
6     Constantine says perfect. They knew about the discussion  
7     how to sell Nick Privitello. Hey, MetaBank, and you heard  
8     Privitello say about MetaBank, that was a big selling  
9     point. Hey, Eufora will suddenly, you know, have this  
10    access to all this capital now, except he gets nothing.

11           The Government's Exhibit 503.1, one of the  
12    excerpts shows you how basically he's getting nothing but  
13    lies.

14           (Audio clip played.)

15           MR. MISKIEWICZ: Mr. Constantine knows, he says  
16    it right there, he knows how much money is coming in. So  
17    in other words, he's saying, and you'll hear this later  
18    about the Home Depot tape where he makes reference to the  
19    \$700,000 that came through Tim Gaarn. Mr. Constantine is  
20    saying right here to Privitello, he knows where all that  
21    money came. He's using it as an excuse now yes can't give  
22    Nick Privitello anything for his \$200,000, so he's using  
23    it for his benefit in a completely different way, but he's  
24    admitting I know where all that money was coming in.

25           The players, they sent their money to Eufora, I



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1 knew all about that. You, Nick, well, you know, you're  
2 money went to Ron Richards. Listen to what he says here,  
3 and by "here" I'm referring to Government's Exhibit 503.2.

4 (Audio clip played.)

5 MR. MISKIEWICZ: That's a nice entrepreneurial  
6 way of saying what he just said: Fuck you, Nick, you're  
7 never getting your money back, and he didn't.

8 Oh, you heard on cross-examination weren't you  
9 part of a conference call where maybe somebody overheard  
10 that somebody offered you your money back? And, oh, yes,  
11 you heard testimony and cross-examination about, you know,  
12 Nick Privitello didn't take his money back because it was  
13 part and parcel of the Stolper, you know, it had some  
14 ulterior motive, you heard stuff like that. Ask yourself,  
15 common sense, does that make any sense when you hear the  
16 man himself say fuck you, Nick, and your \$200,000.

17 He stole it and he has the audacity to tell this  
18 man you're never getting it back.

19 (Audio clip played.)

20 MR. MISKIEWICZ: Total double-talk. Total  
21 double-talk. We got your money but it went somewhere, but  
22 somebody else was controlling it -- double-talk. And by  
23 the way it is not simply Mr. Privitello's say so about  
24 this e-mail on that tape. It is in evidence, Government's  
25 Exhibit 208.1. He was told, and there are several e-mails

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1 but I'll show you one, just days before. You'll see other  
2 e-mails where he is told where to send the money. And  
3 through John Kaiser, Constantine says: John, per our  
4 conversation please accept this e-mail as a confirmation  
5 that upon our receipt of \$200,000 Eufora's members will  
6 formally execute a membership transfer consent form and  
7 amend the company's operating agreement to reflect a 1.5  
8 percent interest in Eufora LLC which shall be held by Nick  
9 Privitello.

10 That's exactly what Privitello is saying to him  
11 on that recording and exactly in response to which you  
12 heard what Mr. Constantine said and I'll not repeat it.  
13 I've said it out loud and I apologize for saying it but it  
14 is in evidence. You know, I'll not sugar coat it,  
15 consider the words used by this man to an investor. I  
16 didn't say it; he says it to him.

17 There it is. Count 5 and 6, Privitello,  
18 December 7, '09, \$200,000, it is listed as \$200,000, if  
19 you recall there were two wires of 150,000, and then  
20 50,000 because Mr. Privitello had to do it that way to get  
21 out of two different accounts or whatever he said. That's  
22 why it is split up into both Counts 5 and 6. Goes to the  
23 law offices of Ron Richards, goes to AZ Avalon, it's  
24 spent, you know, with essentially that \$150,000 is spent  
25 immediately for Eufora purposes.

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5751

1           It is also some of it is spent again for the  
2       race car lawsuit for Tommy Constantine, that's Patrick  
3       Gonyajr of Carey Rodriguez Greenberg and Paul, \$15,000 you  
4       heard was about, had nothing to do with Eufora. So both a  
5       diversion for benefitting for Mr. Constantine's personal  
6       debts but also for Eufora.

7           And what does Mr. Privitello get out of it?  
8       Nothing. Nothing. To this day nothing.

9           Let's move to the Global Settlement Fund.  
10      Again, recall the testimony that you heard from a number  
11      of the hockey players who said the purpose of the Global  
12      Settlement Fund was mainly to find Ken Jowdy, he's going  
13      to be the fall guy for Kenner and Constantine. Jowdy got  
14      all your money, so we'll sue him, and therein begins the  
15      creation, you can imagine the wheels working at this  
16      point. It's all Jowdy's fault. Of course the players  
17      have no idea at this stage that Phil Kenner is partners  
18      with Ken Jowdy and got to be a partner after sending Ken  
19      Jowdy millions, nor do they know anything about the  
20      millions that Tommy Constantine got out of the Hawaii  
21      diversion through Urban Expansion and other transactions,  
22      but we'll go after Ken Jowdy.

23           In sum and substance, the money goes to Ron  
24      Richards's escrow account, among other documents that  
25      you'll have to look at as Government's Exhibit 1101.

Summation - Miskiewicz

5752

1 Let's skip that.

2 Approximately 2.9 million is raised through the  
3 various hockey players. There's an additional sum of  
4 money from Sergei Gonchar. I don't know what to tell you  
5 about Sergei Gonchar other than he's happy about what ever  
6 Mr. Semple said, just don't tell his wife about it with  
7 Playboy. The 2.9 million from other hockey players of  
8 which \$225,000 goes to the Jowdy legal expenses, that's  
9 it. Everything else, including Sergei Gonchar, 4 million,  
10 go basically to Kenner and Constantine expenses,  
11 including, you know, getting an interest in the Mosquito  
12 Rojo Tequila Company (indicating), and they find the  
13 agents testify they find a business card, Phil Kenner is  
14 the chairperson of this company, but no, no, no, I never  
15 possessed, it was never any manufacturing, there was never  
16 anything. Show him the e-mails that he sent to John  
17 Kaiser. Hey, here are the new Russian bottles, whatever  
18 that is. I don't know what to make of that testimony,  
19 photo shop?

20 Finally, after I produced the bottle  
21 (indicating) and I don't know, I guess it's not a real  
22 bottle. You can have it. You can touch it. It's a real  
23 bottle.

24 Again including Sergei Gonchar, oh, I'm okay,  
25 don't worry about it. That's what went to Jowdy,

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1 litigation expenses.

2 Remember of those litigation expenses, one case  
3 was dismissed and John Kaiser testified that he was told  
4 by the defendant himself, Mr. Kenner, that it was  
5 dismissed because of a forgery. You have to evaluate  
6 Mr. Kaiser's credibility on that. He did tell you that,  
7 you know, he was best friends, he was a close friend and  
8 then after time hit the very end, he ruined my life.  
9 That's legitimate, you must evaluate his bias and his  
10 anger, his anger. I submit there is a difference between  
11 biased and lying and being biased because you are angry  
12 because you've been defrauded for years by one man.

13 And what about, you know, there are many  
14 versions of this. This is Government's Exhibit 757, and  
15 you heard about, you heard during cross-examination this  
16 e-mail from Phil Kenner to various hockey player investors  
17 in GSF. This 1757 happened to go to Mike and Kristin Peca  
18 basically getting their acknowledgment. What Peca said to  
19 a greater or lesser degree, all the hockey players said  
20 when they were pitched face-to-face by Kenner and  
21 Constantine (indicating) in their homes, the principal,  
22 you know, with all of these hockey player victims came  
23 away with, the principal goal here was to go get Ken  
24 Jowdy, and the money goes. They send their money. It is  
25 only after the money is gone that this hall of mirrors

Summation - Miskiewicz

5754

1 erupts (indicating).

2 Oh, by the way, per our conversation please  
3 acknowledge -- you know, through cross-examination you  
4 must have heard this e-mail a dozen times again and again  
5 and again. I'll come back to this in a minute, but you  
6 know from the texts or you will see from the texts that  
7 all those special or those additional interests, those  
8 valuable considerations that you are now getting, now that  
9 we got your money to go fight Ken Jowdy, you will get  
10 other things. You know from the texts that both Kenner  
11 and Constantine are discussing the problems with these  
12 significant, so-called, significant assets.

13 I'll not read every single one again but go  
14 through them, 7427, talking about the problems with  
15 Avalon. 7403, talking about what are we going to do with  
16 the Falcon monthly payments, this is '08, almost a year  
17 before GSF. It goes on and on, significant assets, there  
18 basically is no significant assets as you came to find out  
19 and it took a long time to get there. There were no  
20 significant assets.

21 The Palms condos, gone. The planes, they were  
22 resold to other people. Hockey player money used  
23 basically to get Kenner out of his personal guarantee on  
24 the planes. Time and time again, this please acknowledge  
25 letter, you came to find out over the subsequent months or

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1 weeks, none of it really added up to anything. So again I  
2 would submit to you you can consider whatever they put in  
3 there was again pure theft. Those transfers that went  
4 into GSF represented pure profit for the players, minus  
5 225,000 that was spent in litigation costs for Ken Jowdy,  
6 pure profit for purposes of the money laundering  
7 conspiracy.

8 I mean even the plane. Do you remember the  
9 plane that Joe Juneau gets, the Cessna, that Joe Juneau,  
10 he's one of the bad apples according to one of the  
11 e-mails, Joe Juneau, Ethan Moreau, Owen Nolan. He didn't  
12 want it. Page 195, he didn't want the plane, and when  
13 asked what he got out of his investment in the Airpark, he  
14 says at 195.

15 Question: And then the only money you got out  
16 of it was an airplane?

17 Answer: Well, yeah, the airplane is what I got  
18 out of, the Airpark deal.

19 And then you have to go to Eric Edenholm, Tommy  
20 Constantine's friend.

21 Constantine is about to lose his house because  
22 he's so broke. No shame in that, but what does he do? He  
23 engineers this deal whereby basically they -- Eric  
24 Edenholm has a plane, and the testimony is in evidence,  
25 I'll not summarize it for you, you can go back and read it

**Summation - Miskiewicz**

5756

1 or ask for a read-back. But basically what it comes down  
2 to is to save Constantine from being evicted, shovel his  
3 plane to Joe Juneau, and Constantine takes 400 -- over  
4 \$450,000 from the Global Settlement Fund so that Edenholm  
5 can buy Tommy's house out of foreclosure and keep Tommy  
6 from getting convicted -- evicted.

7 Government's Exhibit 3053 is what I'm showing  
8 you now, that is the wire transfers that show that crooked  
9 deal that had nothing to do with anything any of the  
10 players were told about the Global Settlement Fund.

11 I'll come back to the Global Settlement Fund and  
12 particularly this, but before it gets much later, let me  
13 wrap up here. I've talked to you about the wire transfers  
14 and their significance with respect to the money  
15 laundering and also the wire fraud and the Hawaii GSF and  
16 Eufora aspects of the conspiracy and that both defendants  
17 are charged with that.

18 Count 7 and 8, though, just remember is a  
19 stand-alone sort of set of counts. It only charges the  
20 defendant Kenner. But recall what this is. We're now  
21 going back in time a bit here to 2006 when the Hawaii  
22 fraud is still, it's going strong, lines of credits are  
23 being indebted like crazy, and John Kaiser and other  
24 partners of his have a house in Sag Harbor, they've bought  
25 it, they've bought it months or years earlier, it is under



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5757

1 a different name of an LLC, North Point Properties, and  
2 Kenner finds out about it. He finds out that one of the  
3 John Kaiser's partners wants out, and so he engineers a  
4 deal.

5 Like so much of everything else that you've seen  
6 in this trial, he engineers a deal whereby he gets  
7 property, this Sag Harbor property for putting no money  
8 down, but basically stealing it from Michael Peca.

9 He creates the Led Better Development Company,  
10 and again not to use the phrase too many times, but common  
11 sense would say well, if three out of the four people will  
12 continue owning this property and all we'll do is bring in  
13 one person, why create a new owner, Led Better? Kaiser  
14 said it made no sense. We'll have to pay transfer taxes.  
15 Kenner didn't care. It's not his money any way. So he  
16 creates the Led Better Development Company into which the  
17 property is now going to be sold, more taxes to Suffolk  
18 County, and contrary to what Brian Berard is told, he's  
19 told I'll be 50 percent owner with Kaiser and whoever else  
20 is the remaining partner, there's the operating agreement.  
21 Phil Kenner is suddenly a 25 percent owner.

22 And where did he get the money? He got the  
23 money by drawing down \$395,000 out of Michael Peca's line  
24 of credit, just pure theft, and a wire transfer and a wire  
25 transfer that touched and affected the Eastern District of

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5758

1 New York because this is where the closing was, and it is  
2 just pure theft.

3 You know, if you look at among other things  
4 Government's Exhibit 2001, the loan transaction history  
5 for Michael Peca's line of credit, you will see the money  
6 go out and you saw the closing documents and you heard  
7 Mr. Betesh testify. And by the way those loan transaction  
8 reports, do you remember Kristin Peca's recorded  
9 conversation with the defendant early on in the trial?  
10 She is trying to find out what happened to our money?  
11 Where did it go? How can I trace the records? And Kenner  
12 says to her, I don't have them, trace it all, go to  
13 Northern Trust, trace it all. He said, follow it all.

14 Government's Exhibit 5103-L, the loan  
15 transaction histories. Where were they? In his house.  
16 He lied to her. I don't have any records. Well, he lied  
17 to Bill Ranford.

18 Why would Ranford who is just trying to get a  
19 handle on where his money is, why would he come up with a  
20 story like I asked him where the records are and he told  
21 me his laptop or his hard drive had crashed, just weeks  
22 before his as? And you know that was false, but Kenner  
23 had a different version of that event, but I'll leave it  
24 to you. You have to make the determination who to  
25 believe.

**Summation - Miskiewicz**

5759

1           So Led Better, very simple, \$395,000 comes out  
2       of Peca's account and I will submit to you this. Look at  
3       that. It goes from one holding company to another holding  
4       company and then to a third holding company, all of which  
5       Phil Kenner controlled. What is that about other than a  
6       series of financial transactions to launder stolen money  
7       and conceal where it came from?

8           And Mr. Berard similarly is also another victim  
9       of this because he's also putting up \$375,000 to buy his  
10      half of the interest. And as the money flows, again, it  
11      all is to the benefit of Mr. Kenner. Nobody else  
12      benefited from this. And when Michael Peca was asked on  
13      the stand at the beginning of the trial, do you remember  
14      there was a cross-examination and testimony that, you  
15      know, Michael Peca in his grand jury appearance suggested  
16      maybe he had heard about the Jowdy loan? He also  
17      testified he was very upset or concerned about it because  
18      he wasn't -- read his testimony about what he said about  
19      what he really specifically recalled and when he learned  
20      about, you know, money going to Jowdy.

21           Remember he's testifying in 2011. Jowdy is out  
22      there. Jowdy is the bad guy in 2011, so it's not  
23      particularly surprising, and I submit you can go down that  
24      rabbit hole if you want but it will not get you very far  
25      because by 2011 Jowdy is the bad guy and Michael Peca has

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1     been told he's the bad guy, okay, but on the stand, in  
2     this courtroom, he was shown that line of credit  
3     transaction and asked, and on or about this date, July of  
4     2012, this is when he's recording Kenner and saying I  
5     never would have put my money in Hawaii -- I mean in  
6     Mexico. I never would have done that. He's now a year  
7     after the grand jury appearance confronting Kenner. I  
8     never would have done that. He's asked: On or about that  
9     day when you were making this recording, had you seen that  
10    \$395,000 wire that we talked about earlier this morning to  
11    something called Led Better?

12             Answer: I had not.

13             Question: Did you have any knowledge of it?

14             Answer: I do not. "

15             I can't end with any sort of soaring rhetoric  
16     because you've guys have been very serious and attentive  
17     to the facts here, but there are certain things I want to  
18     just leave with you with respect to the fact that this is  
19     not only a conspiracy that began in '03 or '04 with  
20     Hawaii, but it is one that continued right up through the  
21     2013 date set forth in the indictment.

22             Do you remember Tyson Nash who e-mailed Kenner,  
23     and the e-mail came in relatively late, about the same  
24     time as the Stolper lawsuit? The Stolper lawsuit which is  
25     one of those things that go nowhere, this time it is about

**Summation - Miskiewicz**

5761

1 Eufora, hostile takeover, whatever. And, again, Mr. Nash  
2 at about that same time is asking, can you give me  
3 records, Phil? And what does he respond? He says in sum  
4 and substance, find me the rat. And you know Sergei  
5 Gonchar is feeding information back to the person, the  
6 co-conspirator Tommy Constantine, so he knows information  
7 about what is going on.

8 You heard from Mr. Gonchar, he wore his iPhone  
9 and kept his iPhone on during a meeting in New York. Find  
10 me the rat. Mr. Nash wants records, he wants an  
11 explanation where his money is and Mr. Kenner, all he can  
12 think of is saying find me the rat.

13 Now we know, you know, who the rat was in that  
14 Stolper meeting. Maybe now Mr. Nash will get his records.

15 You heard through the defendant the testimony  
16 that that whole Sag Harbor Led Better thing, that was  
17 Manfredi, Kaiser, extorting. They didn't want to close on  
18 the Lehman deal so Kaiser wanted some kind of a short term  
19 \$400,000 loan. It goes on and on and on. You know, try  
20 to read the testimony and see if it makes any sense to  
21 you.

22 Again you can follow the rabbit hole and it will  
23 lead you nowhere or you can stick to the facts of the  
24 misrepresentations and the elements of the fraud charge  
25 and it will, I think, bring you to what really happened.

**Summation - Miskiewicz**

5762

1           He says he did this \$400,000 transaction back  
2           and forth because of this extorted \$400,000 short term  
3           loan because, you know, Kaiser didn't have any money and  
4           he wanted money and that's yes had to borrow or whatever.  
5           I don't know even if he said borrow from Michael Peca that  
6           395. I submit to you whether that is true or not is  
7           immaterial.

8           Peca is the victim in Sag Harbor. He's the guy  
9           who is, you know, got his line of credit stolen from and  
10          got nothing for it. He's not even on the operating  
11          agreement, even if you want to believe that rabbit hole of  
12          lies regarding the short term loan. But again in terms of  
13          evaluating the truthfulness of that contention, remember  
14          on cross-examination Mr. Kenner said, you know, in sum and  
15          substance, that he was giving money to Mr. Kaiser at that  
16          same time, but then he was confronted with testimony that  
17          covered that same period of time in another piece of  
18          litigation and he was asked about a prior inconsistent  
19          statement, and Judge Bianco will also charge you how to  
20          consider prior inconsistent statements and the credibility  
21          of witnesses.

22          In that prior deposition, Kenner said it wasn't  
23          Kaiser who owed him money, it was Kenner who owed Kaiser  
24          money. In fact so much money that he lost one of his  
25          companies to Kaiser, Baja Development Company. And then

**Summation - Miskiewicz**

5763

1 on recross and whatever, he said, no, I didn't say Baja, I  
2 meant something else.

3 Again you can follow that rabbit hole, whether  
4 it was Baja Ventures or Hawaii Ventures, the bottom line  
5 is he said two different things at two different times  
6 about the same event. One day Kaiser owes him money,  
7 400,000, the next day or his prior statement was, no, I  
8 was so indebted I went into default, I had to give him one  
9 of my companies. It makes no sense. It's a total lie.

10 And by the way, whose fault is it? The mirror  
11 of lies here is it Ken Jowdy's fault, Kaiser's fault, it's  
12 the bad apples, it's the FBI.

13 What did he say when confronted with his prior  
14 inconsistent statement? Oh, I didn't say it, it's the  
15 poor court reporter's fault. Really, is that how far  
16 we'll go to find reasonable doubt that this man is just a  
17 fraudster?

18 You don't need too much more than that Home  
19 Depot tape which came in again late in the trial. I'll  
20 not play it for you. There's so much there and you all  
21 want to go to lunch, I know, but listen to what he says  
22 about, you know, Constantine saying, you think they're  
23 only a pinch, the getaway car driver not the guy who stuck  
24 up the bank or words to that effect? You know, you will  
25 burn the house down. The FBI is all over the place.

**Summation - Miskiewicz**

5764

1           It goes on. It's Government's Exhibit 4500. He  
2 makes reference to that Tim Gaarn, those substantive  
3 counts, how will it look when that \$700,000 goes back and  
4 forth? And Constantine, what does he say? I have  
5 explanations, I got paper, whatever he says. You have to  
6 rely on the actual exhibit. Basically I got a story for  
7 everything. And what happens? The whole purpose of that  
8 is, the whole purpose of Mr. Constantine's plea in that  
9 conversation is to send word to the people in New York,  
10 Stolper, lay off, stop, stop, stop. The word "stop" must  
11 have been 100 times in Government's Exhibit 4500. And you  
12 saw the e-mail and Mr. Kenner saying your message has been  
13 conveyed.

14           Did anything come out of that Stolper lawsuit?  
15 Mr. Privitello have his stock certificate? No. He got,  
16 you know, an "FU," that's all he got. And all those other  
17 players whose money just flowed through the Wachovia  
18 account, they got nothing. That conversation, and granted  
19 it is mostly Constantine talking, you know, I submit to  
20 you couldn't be stronger evidence of the fact that on that  
21 day of that August of 2010, the conspiracy was alive and  
22 well again. Just continue.

23           Your message has been conveyed, Stolper goes  
24 nowhere, it is all, you know, don't worry about it.

25           A personal story: I in law school was addicted



**Summation - Miskiewicz**

5765

1 to watching infomercials late at night when I couldn't  
2 fall asleep. My favorite was the late great Billy Mazer,  
3 who back in the day sold mostly OxiClean which I never  
4 heard of and now you can find it all over the place but  
5 back then you couldn't find it. I was enthralled by this  
6 pitchman's ability to, in an entertaining fashion, get you  
7 to believe you should buy this product. And you know for  
8 awhile I had plenty of that junk in my house. I got a  
9 Pocket Fisherman. I don't have a Veg-O-Matic -- I wish I  
10 did.

11 You heard the cross-examination of this, please  
12 acknowledge the Global Settlement Fund money again and  
13 again. You know what went on in my mind every time when I  
14 heard the reading of this. But if you were to order and  
15 you order right now within the next 15 minutes, and not  
16 only that but we'll not send you not one, we'll send you  
17 two. That's what this is (crumbling document). The only  
18 difference is when Billy Mazer said he will send you the  
19 two buckets of OxiClean, you got the two buckets. These  
20 guys, hockey players, John Kaiser, Ethel Kaiser, everyone,  
21 they got nothing, and I submit to you that proves beyond a  
22 reasonable doubt that they are guilty of each and every  
23 count of this indictment and I ask you to find them  
24 guilty.

25 Thank you for your attention.

**Summation - Miskiewicz**

5766

1 THE COURT: Okay. Members of the jury, it's  
2 105. We'll restart at 2 o'clock with the summations.

3 Do not discuss the case. Have a good lunch.

4 (Whereupon, at this time the jury exits the  
5 courtroom.)

6 THE COURT: Please be seated. I just want to  
7 put something on the record. My intern mentioned during  
8 the break this morning she rode up in the elevator with  
9 one of the jurors and said how is it going? They said  
10 they are getting along fine, celebrated a baby shower, and  
11 they are getting along fine, so it was an innocuous  
12 conversation. The intern sits the back of courtroom every  
13 day so I guess she works for me in some capacity. But I  
14 instruct the interns they should follow the rules you  
15 should follow, no conversation, no matter how innocuous.

16 Any objection to that?

17 MR. MISKIEWICZ: No, your Honor.

18 MR. LARUSSO: No, your Honor.

19 MR. HALEY: No, sir.

20 THE COURT: Mr. Haley, 2 o'clock.

21 MR. HALEY: Yes, sir.

22 THE COURT: Have a good lunch.

23 (Whereupon, an afternoon recess was taken.)  
24  
25

**Summation - Haley**

5767

1 A F T E R N O O N S E S S I O N

2 2 pm

3

4 THE COURT: Ready to go, Mr. Haley?

5 MR. HALEY: Yes, your Honor.

6 (The following ensued in the presence of the  
7 jury.)

8 THE COURT: Everyone, please be seated.

9 Members of the jury, you will now hear from  
10 counsel for Mr. Kenner, Mr. Haley's summation.

11 Mr. Haley.

12 SUMMATION FOR DEFENSE

13 MR. HALEY: After eight and a half weeks of  
14 trial and the conclusion of the government's summation,  
15 Phil Kenner as he stands next to me is presumed innocent.

16 And that principle, ladies and gentlemen, is the  
17 life blood of our Constitution. And that principle, along  
18 with your presence here and your role in this trial, was  
19 designed by the framers of our Constitution to ensure that  
20 the awesome power possessed by our government is equalized  
21 when our government prosecutes one of us.

22 It is fitting, if not prophetic, that this case,  
23 this particular case, is coming to a conclusion on the eve  
24 of the Fourth of July and you will be deliberating in this  
25 case following the Fourth of July.

Summation - Haley

5768

1 Well, where do we begin?

2 Conceptually, we begin where we started. And as  
3 I told you in the opening statement and as Judge Bianco  
4 told you in his initial instructions, Phil Kenner is the  
5 accused. It is the government's case that is on trial  
6 because the government bears the burden to prove its case  
7 beyond a reasonable doubt on each and every element of the  
8 offense charged for each and every charge in that  
9 indictment. Nine counts.

10 Now, with reference to the burden of proof, one  
11 of those fundamental elements is whether or not the  
12 government has proven beyond a reasonable doubt that Phil  
13 Kenner's actions were part of an artifice or scheme to  
14 defraud or were they part of an effort to further the  
15 investment objectives of his clients in what everyone has  
16 acknowledged were risky investments, particularly in the  
17 Hawaii land development, but with the great potential for  
18 profit should those very are real estate investments come  
19 to fruition.

20 Now, in the opening statement, where I had the  
21 privilege to address you on May 4 for the first time, I  
22 said this to you.

23 *I make you this promise in conclusion. I will*  
24 *do all that I can to elicit all the information through*  
25 *the questioning of witnesses, as well as present evidence*

**Summation - Haley**

5769

1     *to you through my own client and others, so that you will*  
2     *have the opportunity to make a determination on a full set*  
3     *of facts as relates to whether or not the government has*  
4     *proven its case beyond a reasonable doubt in terms of the*  
5     *alleged crimes set forth in the indictment.*

6             That was my promise to you. The government made  
7     you no such promise in their opening statement, for if  
8     they did, they broke that promise.

9             I will also say, for purposes of my remarks to  
10    you during the course of this summation, I will not raise  
11    my voice. I will not use emotive terms like ripping off,  
12    blasted out, rappole. I will not crunch papers in front  
13    of you. I will do everything I can to appeal to your  
14    collective judgment, intellect, without using highly  
15    emotive terms.

16            But I will say this, ladies and gentlemen. That  
17    dripping sarcasm by an attorney employed by the United  
18    States Department of Justice in his summation to you is  
19    not proof beyond a reasonable doubt.

20            Now, you may recall in my opening statement to  
21    you I said as this case unfolds, longer than the five  
22    weeks we anticipated, that some of the issues that will  
23    arise in this case as part of the defense will include:

24            How did the FBI come to target Phil Kenner for a  
25    criminal investigation in the first instance?

**Summation - Haley**

5770

1                   What was their motive?

2                   Did the FBI, during the course of this  
3                   in-excess-of-six-year investigation, deliberately ignore  
4                   evidence in their possession, favorable evidence that may  
5                   or would demonstrate this Phil Kenner committed no crimes  
6                   or that Phil Kenner was not a coconspirator with anyone?

7                   Did the FBI coach and control witnesses to help  
8                   orchestrate these criminal charges?

9                   Did the government giver sweetheart deals, as  
10                  alluded to in the opening statement of the government?  
11                  And we will be talking about the deal that was given to  
12                  Tim Gaarn before I finish this summation.

13                  And did the government ignore the crimes and  
14                  misdeeds of others in order to orchestrate the charge  
15                  against Phil Kenner?

16                  Those are some of the issues. But what is now  
17                  more disturbing since the trial commenced and up to this  
18                  very moment: In its quest to convict Phil Kenner, did the  
19                  government allow and even encourage perjured testimony  
20                  from some of its witnesses?

21                  There is, ladies and gentlemen, a document known  
22                  as Phil Kenner 43. It is this document. And this may be  
23                  the most singularly important defense document in this  
24                  case.

25                  And it is the only time I will use that device

**Summation - Haley**

5771

1 over there. If I can use it efficiently, you will be able  
2 to view what is on this document.

3 John Kaiser was a central government witness.  
4 As a matter of fact, by my count he was mentioned during  
5 the government's summation no less than 19 times. At some  
6 point I lost count. Maybe it was more. Maybe it was  
7 less. The government will have an opportunity in its  
8 rebuttal to look at my arithmetic.

9 Listening to the government's summation, one  
10 would think that John Kaiser was the sole victim of what  
11 the government alleges to be the multiple frauds. They  
12 did have occasion to mention, let's say, the Ranford,  
13 Steve Rucchin, I don't even recall if Darryl Sydor was  
14 mentioned, but John Kaiser was mentioned.

15 Now, we know who John Kaiser is. John Kaiser is  
16 currently employed by Ken Jowdy as his director of  
17 construction. We know, as the government elicited from  
18 John Kaiser, that though he has no degree in architecture,  
19 though he has no civil engineering degree, he does have  
20 experience in construction.

21 We know from his testimony that he did at one  
22 point in time build a White Castle restaurant. As a  
23 matter of fact the government mentioned in summation that  
24 he is a builder. He built that White Castle restaurant  
25 from ground to roof.

**Summation - Haley**

5772

1 We do know from Brian Berard there is no plan to  
2 build any White Castle restaurant at Diamanté San Lucas.

3 We know that John Kaiser, as brought out by the  
4 government in its direct case, is a retired New York City  
5 police officer, Suffolk County Police officer, retired  
6 from the job on a disability pension as a result of neck  
7 and back injury. And indeed, any of our public servants  
8 are entitled to disability pensions should they injured in  
9 the line of duty. No question about that, ladies and  
10 gentlemen.

11 And we know that John Kaiser, by all appearances  
12 his injuries have pretty much resolved themselves because  
13 we heard testimony that when he visiting Hawaii they would  
14 cover the land, look at the land they were purchasing,  
15 step over cattle fences, things of that nature.

16 We know that now as a builder he is involved in  
17 vertical construction. That means going up and down. Why  
18 is that relevant? I do not mean to be sarcastic, ladies  
19 and gentlemen, but when the government puts in front you a  
20 witness to suggest that that witness has believability  
21 because of his public service, and when the government  
22 puts in front of you a witness and says the public service  
23 included injury on the job by which he is now disabled,  
24 well, let's talk about Kenner Exhibit 43.

25 During the course of his testimony, John Kaiser



Summation - Haley

5773

1 was asked by me on cross-examination.

2           *Question: Mr. Kaiser, isn't it true that when*  
3 *you were interviewed by Special Agent Scott Romanowski and*  
4 *Special Agent Matt Galioto with the FBI on October 19,*  
5 *2010, at 11 am, you told the agents that you met Jowdy*  
6 *twice in New York City, and at a second meeting at a bar*  
7 *in New York City you discussed with him Hawaii and the*  
8 *lending of money in Hawaii to Mexico. Isn't that true?*

9           *Answer: No.*

10           *You did not tell the FBI agents what I just*  
11 *related?*

12           *Answer: That's correct.*

13           *Question: Isn't it true, Mr. Kaiser, during an*  
14 *interview with the FBI on October 19, 2010, 11 am,*  
15 *specifically Scott Romanowski and Matt Galioto, that you*  
16 *told them that you saw Ken Jowdy in Mexico a couple of*  
17 *times and discussed with Ken Jowdy you wanted to borrow*  
18 *money from Hawaii to Mexico and would pay it back after*  
19 *the closing?*

20           *Answer: No.*

21           *Isn't true, sir, that on October 19, 11 am,*  
22 *interview conducted by Scott Romanowski and Matt Galioto*  
23 *of the Federal Bureau of Investigation you told them that*  
24 *Ken Jowdy brought up money .. Ken Jowdy brought up*  
25 *borrowing money from Hawaii projects, borrowed millions,*

Summation - Haley

5774

1     *five to six million from the Hawaii project, there was*  
2     *first going to be hundreds of thousands, not millions, and*  
3     *that Ken Jowdy was not happy that the money amount started*  
4     *to grow to millions after money to Mexico?*

5             Answer: No.

6             Let's take a look at Kenner Exhibit 43. This is  
7     in evidence.

8             Kenner Exhibit 43, October 19, 2010, 11 am.  
9     Scott R, I suggest to you that that is Scott Romanowski,  
10    Matt G, I suggest to you that that's Matt Galioto of the  
11    FBI, and John Kaiser.

12            These are as admitted into evidence, ladies and  
13    gentlemen, the notes of that telephonic interview.

14            JK, I'm going to suggest you to you that's John  
15    Kaiser, met Jowdy -- twice in New York City in New York  
16    City -- trust 2003 -- Jowdy restaurant discussed,  
17    discussed project in Hawaii, funding in Mexico.

18            There at, it says PK, KJ with girl. I'm going  
19    to suggest to you that a fair interpretation of the those  
20    notes is that when that meeting takes place, Phil Kenner  
21    was present and Ken Jowdy was with a girl.

22            Second time. Another time at a bar in New York  
23    City. R discussed Hawaii. Lending, looks to me like a  
24    dollar sign, from Hawaii to Mexico.

25            We have KJ, Ken Jowdy, JK, John Kaiser.

**Summation - Haley**

5775

1 JK: Not sure how Ken Jowdy and circle,  
2 uncertain who those initials are, met.

3 Next line. JK, John Kaiser, saw KJ, Ken Jowdy,  
4 in Mexico a couple of times. Again discussed KJ continued  
5 to borrow, looks like a dollar sign to me, from Hawaii to  
6 Mexico with payback after closing.

7 Do you remember Phil Kenner testified that there  
8 was a deal that Ken Jowdy would pay back the money that  
9 was loaned from the Hawaii land develop to his Mexican  
10 project after the closing of Lehman and it didn't happen?

11 They were hoping that this relationship with Ken  
12 Jowdy would come to fruition after the Lehman closing and  
13 they would get paid back. There was no reason in all  
14 those documents that the government points to, saying:  
15 Ah, Ken Jowdy is there. They are not advising anyone that  
16 there is an unpaid loan. At this point in time there was  
17 still the hope that Ken Jowdy would make good on the loan  
18 that came out of Hawaii to Mexico.

19 Next page. KJ, Ken Jowdy. I suggest KJ is Ken  
20 Jowdy, ladies and gentlemen, but it is your  
21 interpretation, brought up borrowing dollar sign from  
22 Hawaii project. Borrowed millions, point five to six  
23 million, from Hawaii project.

24 First going to be hundreds, Ks, not millions.

25 JK: Not happy dollar amount started to grow to

Summation - Haley

5776

1 millions of dollars to Mexico.

2 Discussed Brian Berard, PK, was agreement to  
3 borrow money from Hawaii.

4 Again, Ken Jowdy to JK.

5 Ken Jowdy: Don't worry. It will all come back.  
6 Get repaid in New York City. Discussed money from Hawaii  
7 to Mexico just to be used for Mexico.

8 Now, this document, Kenner Exhibit 43, was in  
9 the possession of the government. It is their document.  
10 They created the document. It was in the possession of  
11 the government when John Kaiser answered those questions  
12 under oath. And everyone at that table, the prosecution  
13 table, remained silent.

14 Well, it was addressed by the government when  
15 they conducted the redirect of Ken Jowdy.

16 *Question: Now, were you asked last week a*  
17 *series -- withdrawn. Very quickly.*

18 *Were you asked, really by both Mr. Haley and*  
19 *Mr. LaRusso, a series of questions about some notes of an*  
20 *interview? I'm going to show you the notes that were*  
21 *shown to you, 3500JK1.*

22 This is 3500JK1. Ladies and gentlemen, you will  
23 have the opportunity to look at this when you deliberate.  
24 You will have the opportunity to look at each and every  
25 document by both defense as well as the government. But

Summation - Haley

5777

1 the defense documents will be available for review as  
2 well. I am not going to spend all the time going over the  
3 defense documents here but you will have that opportunity.

4 But this JK1 is central because it sets the tone  
5 to what the government and how the government presented  
6 its case to you. So let's continue.

7 Now, you were also asked last week a series,  
8 withdrawn, very quickly, you were asked really by both Mr.  
9 Haley and Mr. LaRusso a series of questions about some  
10 notes of an interview.

11 I'm going to show you the notes that were shown,  
12 3500JK1.

13 *Question: In that time frame, roughly October*  
14 *2010, you were asked by Mr. Haley and also Mr. LaRusso, a*  
15 *series of questions, did you tell the FBI X, Y and Z?*

16 *Do you remember those questions?*

17 *Answer: Yes, I do. Mr. Haley wanted to know*  
18 *did you have a conversation or did you tell the FBI that*  
19 *you had a conversation with Ken Jowdy about Ken Jowdy*  
20 *bringing money from Hawaii?*

21 *Do you remember that question?*

22 *Yes.*

23 *Now, you said you don't recall, you didn't --*  
24 *you never saw those notes.*

25 *Answer: I never saw those notes.*

Summation - Haley

5778

1                   *Question: In or about the time frame that you*  
2                   *were talking to the FBI, did you tell them about what*  
3                   *Mr. Jowdy told you or what other people were telling you*  
4                   *about Ken Jowdy?*

5                   *Answer: What Mr. Kenner was telling me about*  
6                   *Ken Jowdy.*

7                   Is that consistent with what you saw in these  
8                   notes?

9                   Did Phil Kenner say: Look, when you get  
10                  interviewed by the FBI, you have to give them all this  
11                  kind of detail. You have to tell them that Ken Jowdy was  
12                  with a girl in the first meeting. You have to tell them  
13                  that at the second meetings you discussed Hawaii. You  
14                  have to tell them ....

15                Ladies and gentlemen, I think the document, in  
16                terms of its detail, suggests to you these are notes of an  
17                interview conducted by agents of the Federal Bureau of  
18                Investigation of John Kaiser where he described at that  
19                point in time, before he became an employee of Ken Jowdy  
20                and Diamanté Cabo San Lucas, wherein he and Ken Jowdy are  
21                having a discussion about the Hawaii loan, which is  
22                central to this case, and to feed up the question: Well,  
23                whatever I told the FBI on that day I did not know of my  
24                own personal knowledge but was told to me by Phil Kenner.

25                How often during the course of the trial did you

Summation - Haley

5779

1 hear a government witness say the that? *Well, I didn't*  
2 *know of my own personal knowledge. It was told to me by*  
3 *Phil Kenner?*

4 And I really don't mean to be facetious, ladies  
5 and gentlemen, but at times it was if you could ask the  
6 government witness what day of the week it is, and they  
7 would say well, it is Thursday, and I know it's Thursday  
8 because Phil Kenner told me it's Thursday, and Phil Kenner  
9 is my trusted financial advisor.

10 It was a theme that they played time and time  
11 again to you, to suggest that their witnesses had no  
12 ability to have any understanding of any of their finances  
13 unless Phil Kenner told them what it was or advised them  
14 as to the nature and extent of that investment.

15 You know, from my perspective, I'm not going to  
16 tell you a personal story about a hockey player or  
17 anything of that nature, but from my perspective I should  
18 be able to sit down right now. I should be able to say:  
19 The way the government presented this case to you, to  
20 allow testimony of that type and nature to be put before  
21 you when they know it was wholly inconsistent with an  
22 interview of John Kaiser that was conducted on October 19,  
23 2010, ought to say to you we cannot in good conscience  
24 base a verdict of guilty against a fellow citizen. It  
25 happened here in an American courtroom in front of you.

Summation - Haley

5780

1 Now, there is one, ladies and gentlemen, and as  
2 an obligation to my client and, from my perspective, my  
3 obligation to you, let's talk about other instances where  
4 the government, at a bare minimum, ignored documents in  
5 their possession and put a witness on the stand without,  
6 by all appearances, before they put that witness on the  
7 stand having any interview by which the witness may say  
8 something to them and say: Well, wait a minute, you tell  
9 us that but there is a document that suggests otherwise.  
10 They didn't do that. And actually, it happened with Bill  
11 Ranford.

12 Now, we know that Bill Ranford testified quite  
13 directly that he was unaware of his money coming out of  
14 his Schwab account, \$100,000, on February 6, 2009, being  
15 moved from account, pursuant to the power of attorney that  
16 Phil Kenner possessed, from his Schwab account to Eufora,  
17 where indeed it was then, after it went to Eufora, placed  
18 into the account of Tim Gaarn, and then Tim Gaarn made  
19 payments out of that account to Phil Kenner. We don't  
20 dispute that those bank records exist.

21 So he said no, I was unaware of that on February  
22 9, 2009. He also said he was unaware of the transfer from  
23 his account in the amount of \$100,000 on May 4, 2009. And  
24 the testimony speaks for itself.

25 *I knew nothing about this money.*



Summation - Haley

5781

1                   *When was the first time you saw this document?*

2           Referring to the Schwab documents whereby Phil Kenner,  
3           utilizing the power of attorney, transferred those monies  
4           to Eufora which then went to Mr. Gaarn's account.

5                   *When you guys showed it to me.*

6                   But what did he say when questioned on  
7           cross-examination? I reminded him in his direct  
8           examination that he said he is a bit of a paper rat.

9                   *Mr. Haley: I'm a bit of a paper rat. That's*  
10          *what you just said a short moment ago. Is that correct,*  
11          *Mr. Rucchin?*

12                   *No, I'm Mr. Ranford.*

13                   *Yes.*

14                   *And by that term, by the way, all you hockey*  
15          *players, you all have the same physique, and to your*  
16          *credit that's quite all right. Okay. But he goes on to*  
17          *say.*

18                   *Question: I'm a bit of a paper rat. What do*  
19          *you mean by that?*

20                   *Answer: Well, I try and keep as much paperwork*  
21          *as possible on, as far as my bank records and that sort of*  
22          *thing. When I pay my bills, I guess when -- the biggest*  
23          *issue a professional athlete is, you have to worry about*  
24          *being audited so I try to hold on to whatever I can.*

25                   *So if you get a letter, let's say, from a bank,*

Summation - Haley

5782

1     *you will retain it, correct?*

2             *Answer: Most times. I do have emails.*

3             He goes on.

4             What then occurred, ladies and gentlemen, is, he  
5     was shown in cross-examination two documents. Charles  
6     Schwab February 6, 2009, reflecting that \$100,000  
7     transfer.

8             *Next step. If you do not recognize this*  
9     *transaction or if you have any questions regarding this*  
10    *transaction, please contact us immediately at the*  
11    *telephone number above.*

12            And that correlates with the February 6, 2009,  
13    transfer that he claims he knew nothing about. This paper  
14    rat apparently did not comprehend that document.

15            We know, Kenner Exhibit 88, May 4. Amount of  
16    transfer, \$100,000.

17            *Again, if you do not recognize this transaction*  
18    *or if you have any other questions regarding the*  
19    *transaction, please contact us immediately at the*  
20    *telephone number above.*

21            If the government was eliciting that testimony  
22    from Mr. Ranford, as they did, and you heard repeatedly  
23    that all these documents were acquired by the defense  
24    through the discovery process where we received them, they  
25    were then passed along to my client and now they become

**Summation - Haley**

5783

1 defense exhibits as well, these government witnesses were  
2 interviewed by the government before they testify, and if  
3 he said no, I knew nothing about it, well wait a minute,  
4 Bill. Could you explain this to us? They apparently  
5 elected not to do it.

6 And that's what I meant, ladies and gentlemen.  
7 When I said I would do everything in my power to see to it  
8 that you would have all the information available to you to  
9 make an informed decision as to whether or not the  
10 government has proven its case beyond a reasonable doubt,  
11 the defense had to make sure throughout this entire trial  
12 that documents in the possession of the government that  
13 would suggest that a witness is not necessarily telling  
14 you the truth, the whole truth, and nothing but the truth  
15 had to be brought to your attention.

16 As far as Bill Ranford is concerned, much like  
17 the interview with John Kaiser, we have government  
18 telephonic exhibit 3500WR2. And there is information  
19 contained on that. There is information regarding Eufora  
20 investment.

21 And on the next page what do we see? These are  
22 notes of an interview of Bill Ranford as conducted by  
23 Scott R, Matt G, Scott Romanowski, mat Galimoto, wherein,  
24 during the course of that interview, someone said total,  
25 it says 300, there was another number there, in Eufora,

Summation - Haley

5784

1 several times Eufora 2009, 100K February, 100K May.

2 Well, the idea of an interview, ladies and  
3 gentlemen, is that the agents call the individual and ask  
4 them questions and he responds to the questions. So when  
5 the government elicits, as we heard in this testimony, his  
6 denial of having any knowledge of those \$100,000 transfers  
7 on those two occasions, it was inconsistent with the notes  
8 taken by the government of him during this telephonic  
9 interview on July 25, 2012, and it was inconsistent with  
10 the Schwab records that I have just shown to you.

11 And the government remained silent as they sat  
12 at that table. No redirect of Bill Ranford to suggest as  
13 to how that testimony had to be, how that testimony  
14 evolved when documentary evidence suggested something  
15 else.

16 I told you that one of the issues that you would  
17 consider when you examine the government's case -- and as  
18 I said, it is the government's case that is on trial  
19 here -- was whether or not the government was coaching its  
20 witnesses. How many times do you recall -- how often did  
21 you hear the phrase *I don't recall* from a government  
22 witness when they were pressed on cross-examination on an  
23 issue that might be inconsistent with their direct  
24 testimony? Maybe as many times as you heard me say *no*  
25 *objection*.

Summation - Haley

5785

1 By the way, you will have an opportunity to have  
2 read back to you any person's testimony you so choose.  
3 And I would suggest as relates to that, have the testimony  
4 of Steve Rucchin read back, if that is your desire,  
5 during, cross-examination and count the number of  
6 instances where he says *I don't recall, I don't recall, I*  
7 *don't recall.*

8 But what would occur is, after the witness on  
9 cross-examination would say *I don't recall*, the government  
10 would then in redirect fire -- fire -- a number of leading  
11 questions to the witness.

12 Now, they testified they didn't recall the  
13 conversation until the government gets up and on redirect  
14 says in substance:

15 *Well, isn't it true that you weren't told this?*  
16 *Oh, I recall I wasn't told that.*

17 *Isn't it true that you weren't told this?*

18 *Well, I recall I wasn't told that.*

19 They teed up the questions for them, ladies and  
20 gentlemen.

21 You know, it is all right when you are playing  
22 hockey to have that team spirit, that collective mentality  
23 that we are all here to pull for the team. And those  
24 hockey player clients in this case, they are playing for a  
25 pretty powerful team. They are playing for the United

Summation - Haley

5786

1 States of America. They know a winning team when they see  
2 it.

3 And I hate to use this analogy. I'm not  
4 necessarily a hockey fan. So the government fired the  
5 puck to them, and they instinctively turn and fire that  
6 puck into an open net. And it is an open net because the  
7 only one that can hold them accountable for any false  
8 testimony that they may give on the stand in terms of  
9 presenting a charge to a grand jury regarding that perjury  
10 is the United States Attorneys office.

11 It is the only time I will use this phrase  
12 because it is your determination as to whether or not  
13 witnesses lied to you. So in the 19 instances where Mr.  
14 Miskiewicz said: Phil Kenner lied to you on this and Phil  
15 Kenner lied to you on that, Phil Kenner lied to you on  
16 this, Mr. Miskiewicz is not testifying, ladies and  
17 gentlemen.

18 So when he asks that first question of Phil  
19 Kenner:

20 *Isn't it true that your entire testimony is*  
21 *nothing but an elaborate lie*, and Phil said *no*, you know  
22 what the testimony is? The testimony is, *no, it is not a*  
23 *lie*, because Phil Kenner is under oath, not Jim  
24 Miskiewicz.

25 Well, I will say, as relates to any of the other

Summation - Haley

5787

1 witness. You make the determination as to their  
2 credibility subject to cross-examination.

3 Phil Kenner was on the stand for three and a  
4 half days. And let me comment upon this, ladies and  
5 gentlemen. Who were the witnesses that, from your  
6 perspective, after they took the witness stand you had a  
7 sense that they were credible witnesses? Mr. Rozenbloom,  
8 perhaps remember him? Mr. Foster, perhaps. The witnesses  
9 that give you detailed answers to detailed questions I  
10 submit to you are being truthful.

11 And if nothing else perhaps to a fault, Phil  
12 Kenner gave you detailed answers to questions, did he not?  
13 Is that the hallmark of someone who is lying? He had a  
14 remarkable capacity to recall these events because he was  
15 intimately involved in these events. And I suggest to you  
16 that complicated financial transactions over an extended  
17 period of time do not equate to criminal activity.

18 I told you when we opened, or when I opened on  
19 May 4, that we don't dispute any of the bank records that  
20 are submitted or admitted into evidence. It is not a  
21 question of what the bank records say.

22 And indeed that is why I lost count. I dream  
23 about it *no objection* in my sleep. Those records should  
24 go in. I did say to you in my opening statement it is the  
25 interpretation and meaning of those bank records as to

**Summation - Haley**

5788

1 whether or not they constitute a crime.

2 Now, the government, and frankly I think it is  
3 consistent with its opening statement where you were  
4 reminded about hockey players and how they grew up and how  
5 they aspired to be hockey players, their struggle to  
6 become a hockey player. That is perfectly legitimate.  
7 These men worked hard. They became professional athletes,  
8 and to their credit they made a great deal of money.

9 But the government has a playbook. And it's  
10 like if this is a fraud case, we have to have an elderly  
11 victim, we have to have someone who talks about their  
12 nestegg being shattered, we have to have a blue-collar  
13 worker and contrast him against the spend-thrift playboy.

14 And you got all that. You got all of it,  
15 beginning with Ethel Kaiser. What a lovely woman.  
16 Remember Ethel? Eight children in 10 years. 14  
17 grandchildren.

18 She was on the stand for perhaps 15 minutes, and  
19 what we learned is that on the recommendation of her son  
20 John she made various investments, loans, and by her  
21 testimony she was paid back. There was some question  
22 about whether or not there was still a \$70,000 investment  
23 in Eufora out there, but John Kaiser testified that my mom  
24 was completely paid back for all of her monies as relates  
25 the her investments.



**Summation - Haley**

5789

1 I'm sure she was. I'm sure if the investment  
2 that John Kaiser recommended his mom make were not paid  
3 back, I think his nine other siblings would have had  
4 something to say about that.

5 But there was also an instance which is kind of  
6 a defining moment because she testified that, when asked  
7 by me, do you recall your son John after 9-11 traveling to  
8 Hawaii to look at property there? And she said I don't  
9 recall that.

10 It was probably the only instance where, when a  
11 witness said I don't recall that, it was truthful  
12 testimony. You would think well, how could she not recall  
13 that? Why? Because for a woman at that age deceit is not  
14 part of her makeup.

15 They just put Ethel Kaiser on the stand to  
16 appeal to your emotion. That is why they did that. She  
17 suffered no financial loss ultimately as a result of  
18 recommended investments by John Kaiser, certainly not at  
19 the hands of Phil Kenner.

20 You recall of course the testimony of Kristin  
21 Peca. That is where they got in the nestegg testimony.  
22 To their credit, when Michael Peca retired from hockey, by  
23 their own testimony, he had a \$20 million contract. Your  
24 recollection will control. I think over the career he  
25 made \$28 million.

**Summation - Haley**

5790

1 By the way, that is not to say that the wealthy  
2 or the very wealthy are less deserving of the protection  
3 of our criminal statutes than anyone else. But their  
4 nestegg was not shattered by Phil Kenner.

5 We had the blue collar worker, and that was Nick  
6 Privitello. Nick Privitello, electrician, hard-working  
7 guy, no question about it. But they had to elicit that  
8 statement from him that Phil Kenner once told him about  
9 the \$25,000 cabana party.

10 As a matter of fact, if you check the  
11 transcript, he almost forgot to say it. They kind of had  
12 to lead him into that: What about the cabana party  
13 comment? Oh, yes. Phil Kenner told me there was a  
14 \$25,000 cabana party.

15 That didn't take place, ladies and gentlemen.  
16 That was part of this playbook where there are trying to  
17 appeal to, not your intellect, not your collective  
18 judgment, but trying to appeal to your emotional side, to  
19 paint the picture of the fraudster who is shattering  
20 nesteggs, stealing from the elderly, and contrast that  
21 against a hard-working guy like Nick Privitello.

22 Now, we do have, as I characterize it, the chart  
23 and the heart. And again, I don't mean to be facetious,  
24 but do you recall when there was an instance actually  
25 involving \$17,000 paid out to Phil Kenner and that chart

**Summation - Haley**

5791

1 was introduced into evidence, it showed that there had  
2 been a deposit, frankly I forget the hockey player at that  
3 point in time, \$100,000, then later \$17,000 was paid out  
4 following the \$100,000 deposit. I will find that and it  
5 will be in the defendant's exhibits.

6 But what was testified to was: Well, we only  
7 started with \$100,000 came in. And then we saw that  
8 \$17,000 dollars going out to Phil Kenner shortly after  
9 that.

10 They didn't go further up the bank records to  
11 show the \$25,000 deposit from Phil Kenner. They didn't go  
12 up the bank records to show the \$65,000 deposit from Tommy  
13 Constantine. And the answer is well, we just started  
14 there.

15 You know, it occurred to me. You see smoke  
16 billowing out of the window of the room of our neighbor's  
17 child. You run over, push open the door, run up, grab the  
18 child, and run out the front door, the same door you  
19 pushed open. And you get charged with kidnaping.

20 And all the government does is, they show the  
21 video of you going in the house and the video of you going  
22 out of the house. They kind of ignore what happened in  
23 between.

24 The testimony of John Osborn, the government's  
25 expert witness. John Osborn was, without question,

Summation - Haley

5792

1 qualified to render an expert opinion. I don't dispute  
2 that. But what did we hear?

3 We saw and heard him walk to you and present  
4 this chart so that you might review it within, let's say,  
5 15 feet of you. You were also given individual sheets, as  
6 I recall, to hold in your hand so that you could then  
7 apparently, should you not be able to see this chart, be  
8 able to look at the individual charts you had in your  
9 hand.

10 And he told you as a result of his analysis we  
11 can conclude that these signatures are nongenuine.

12 Well, he did say that. But when questioned on  
13 redirect about a report, let me just read to you the  
14 testimony so you have a full understanding.

15 *Question: Mr. Osborne, my name is Rick Haley.*  
16 *I represent Phil Kenner.*

17 *Not less than five minutes ago you stood in*  
18 *front of the jury with these charts and testified, perhaps*  
19 *within 15 feet of this jury, that we can conclude that*  
20 *these signatures are nongenuine.*

21 *That was your direct testimony. Correct?*

22 *Answer: Yes. Correct.*

23 *And you said that on more than one occasion, did*  
24 *you not, in front the jury about five minutes ago?*

25 *Answer: Yes.*

Summation - Haley

5793

1           *You didn't qualify that statement, did you, sir?*

2           *We can conclude that these signatures are nongenuine.*

3           *You didn't qualify that statement.*

4           *Answer: Correct.*

5           *Now, you rendered a report, did you not, in*  
6           *advance of your testimony today, which was provided to the*  
7           *government? Is that correct?*

8           *Yes.*

9           *And you have an understanding, acknowledged,*  
10          *that the report would be provided to the attorneys for the*  
11          *defendants accused in this matter.*

12          *Answer: Yes.*

13          *Just take a look at Kenner Exhibit 105. Do you*  
14          *recognize that document, sir?*

15          *Yes.*

16          *What is it?*

17          *This is a copy of the report which I issued on*  
18          *May 4, 2015. However, it does lack the signatures page of*  
19          *that report.*

20          *Question: But this is the report of your*  
21          *findings and report that reflects your expert opinion as*  
22          *relates to those two signatures in question.*

23          *Answer: Yes.*

24          *And, sir, would we agree that in the written*  
25          *portion of the report under the bold-faced heading you*

Summation - Haley

5794

1 write --

2 Would you like me to read it?

3 Question: I will read it, sir. I'm just asking  
4 you the following, if I read it correctly.

5 Finding. It is highly probable in the opinion  
6 of the undersigned that each of the two convicted  
7 signatures are nongenuine and the product of an attempted  
8 simulation of John Kaiser's signature.

9 This finding is intended by the undersigned to  
10 express an opinion which meets and exceeds the threshold  
11 commonly described within the phrase "within a reasonable  
12 degree of certainty."

13 Why didn't he qualify that answer when he told  
14 you: "We can conclude these signatures are nongenuine?"

15 Now earlier in his testimony he did make  
16 reference to that, ladies and gentlemen. But it is  
17 important that an expert witness be very precise in his  
18 expert opinion to you. And that didn't happen.

19 It continued, because I asked him a question:

20 Sir, isn't it true that in your field of  
21 expertise it is more of an art than a science?

22 And in substance he said: No, I would disagree  
23 with that. It is more of a science than an art. Fair  
24 enough. I then asked him question: Well, as a science --  
25 and I'm paraphrasing, ladies and gentlemen, but you may

Summation - Haley

5795

1 recall this. And it is in the testimony.

2 As a science is it susceptible to computer  
3 analysis? In other words, do you use computers and  
4 software programs to take images of the writings and then  
5 compare it to a computer analysis? He said yes.

6 As a matter of fact, there is a software program  
7 that he is aware of that has been in existence for some  
8 period of time that is designed by, I forget the  
9 gentleman's name, but a person highly regarded in his  
10 field of study. And the question was asked:

11 *Well, did you utilize that program to assist you*  
12 *in your analysis of the handwriting for purposes of this*  
13 *criminal prosecution?*

14 *No.*

15 *No? It wasn't that important?*

16 Does high degree of probability, ladies and  
17 gentlemen, in terms of the opinion of an expert equate to  
18 proof beyond a reasonable doubt? Well, listen to his  
19 Honor's instructions in connection with proof beyond a  
20 reasonable doubt. Hear whether you see something like  
21 *high degree of probability.*

22 (Continued on the following page.)

23

24

25

**Summation - Mr. Haley**

5796

1 MR. HALEY: (Continuing).

2 Darryl Sydor testified. And other witnesses  
3 testified regarding forgeries or what they allege to be  
4 forgeries. And other than this singular document, and I'm  
5 referring to the consulting agreement, there is no other  
6 expert opinion as relates to any other alleged forgery by  
7 the government witnesses. Why not? If any of those  
8 witnesses had, prior to the testimony before you, told the  
9 government, my signature is forged on a significant  
10 document, bank document or something of that nature, rest  
11 assured that expert opinion would have been on the stand  
12 to verify that for you. But we do have the expert opinion  
13 to bolster the testimony of --

14 You know there was testimony as well, Lainey  
15 Donlon testified as to her relationship with Brian Berard,  
16 being close friends over the years with Brian Berard. She  
17 testified that, she says there was a time she saw Phil  
18 Kenner copying a signature, multiple signatures on some  
19 document. No expert testimony regarding that, ladies and  
20 gentlemen, because no such document exists. You will not  
21 see this document as part of the government's proof. It's  
22 not in any of the thousands of exhibits that the  
23 government has acquired through this extensive search over  
24 many years, because it doesn't exist.

25 You know there was something that Lainey Donlon



**Summation - Mr. Haley**

5797

1 said that did have a kernel of truth. And that was when  
2 she said to you, It's all so sad. You know, what is also  
3 sad because as you saw in the photograph of Phil Kenner  
4 and Sergei Gonchar, there was and did exist over a long  
5 period of time a close relationship between Phil Kenner,  
6 the hockey player clients, a relationship of friendship  
7 and trust. And that's what she meant. It's all so sad.  
8 And that occurred when the FBI targeted Phil Kenner for an  
9 investigation, and now the current prosecution.

10 Okay. Let's address each crime as alleged in  
11 the indictment. And I will begin with the lines of  
12 credit.

13 Your recollection, your collective recollections  
14 will control. But as I recall, during the direct  
15 testimony and cross virtually to a person they were  
16 disclaiming knowledge about what was happening with the  
17 Northern Trust accounts, the bond accounts, the lines of  
18 credit -- they were kept in the dark. And they were  
19 unaware of the default notices coming out, default letters  
20 coming out.

21 Kenner Exhibit 207. And these exhibits were  
22 introduced during the testimony of Phil Kenner, who  
23 authenticated the documents as part of our defense. And  
24 you may recall there were a number of those e-mails that  
25 were up on the large screen there that suggested that,

**Summation - Mr. Haley**

5798

1 contrary to what many of these witnesses had told you on  
2 direct about keeping, being held in the dark about what  
3 was happening with the lines of credit and the default  
4 letters, that there were e-mail communications.

5 Steve Rucchin, Exhibit 207. To Phil. Give me a  
6 call today. Want to talk about N Trust. Told I was in  
7 default, interest and late fees, and recently received a  
8 bill for over ten grand.

9 That occurred on April 16, 2009. That was up on  
10 the screen. Some of them were. And all of these, ladies  
11 and gentlemen, all of these you can review as you  
12 deliberate for purposes of this case, so I'm not going to  
13 go through each and every one of them. But that was Steve  
14 Rucchin.

15 Brian Berard, 4609. No rush it's about NT line  
16 of credit. And sign Schwab F X from Stef.

17 Owen Nolan. Where's the packet that needs to be  
18 signed. VP needs \$200,000. Well that talks about the  
19 Toronto settlement. And then as he goes on, Phil Kenner  
20 testified that the conversation, that included  
21 conversations that relate to Northern Trust as reflected  
22 in the e-mail.

23 Owen Nolan received Northern Trust papers, asked  
24 what are the papers for. And the FedEx's.

25 Mr. McKee testified he was unaware that his line

**Summation - Mr. Haley**

5799

1 of credit and his bonds were taken by Schwab. We have  
2 actually Government Exhibit 1526, Jay McKee, 20 Governors  
3 Lane, -- New York. It's a complete history of his line of  
4 credit indicating the existence and status of the line of  
5 credit on May 31 of 2009.

6 You may recall that when presented with  
7 documents of this nature by the defense, on occasion there  
8 would be testimony from government witnesses, I don't  
9 recall this.

10 They would verify, however, that that's their  
11 address. Yes, I was living there at this point in time.  
12 Some of the documents were return-receipt requested. But  
13 there was no evidence that Phil Kenner had the ability to,  
14 the power or the authority to interfere with the delivery  
15 of mail where it is specifically addressed to an  
16 individual by the United States Postal Service or Federal  
17 Express.

18 All of the testimony that you received through  
19 the government in it's direct case regarding lack of  
20 knowledge as to what was happening with the lines of  
21 credit, ladies and gentlemen, I suggest to you is placed  
22 in question by documentary evidence.

23 This is the Northern Trust Bank records as  
24 obtained in this case pursuant to a defendant's subpoena.  
25 Time and time again hockey player clients are signing

**Summation - Mr. Haley**

5800

1 these documents to authorize the transfers, to keep the  
2 line of credit in place with knowledge there are pledge  
3 agreements, that should there be a default, that their  
4 bonds would then be lost because of being pledged pursuant  
5 to that line of credit.

6 No evidence that these are forged signatures.  
7 Again, if there were forged signatures rest assured that  
8 the government would have introduced expert testimony as  
9 relates to those documents.

10 So we have a statement from Owen Nolan --  
11 something different, but I'll get to that in a moment.  
12 No, I'll get to that now.

13 Owen Nolan testified that he was one of those  
14 victims where Phil Kenner had accessed his line of credit  
15 without his knowledge. Yet Owen Nolan had filed an  
16 arbitration. You heard about that pursuant to the  
17 standard advisors agreement with Phil Kenner. And within  
18 that arbitration he never made a claim that Phil Kenner  
19 had accessed his line of credit without Phil Kenner's  
20 (sic) authorization.

21 He did make a claim that he was unaware of the  
22 Hawaii investment -- excuse me -- the Hawaii money going  
23 from Hawaii to Mexico. That was his claim at the time.

24 But when asked, Now, when you filed the paper to  
25 commence the arbitration before the arbitration panel,

**Summation - Mr. Haley**

5801

1 isn't it true, sir, that at that point in time you made no  
2 claim in your papers before the arbitration panel that  
3 Phil Kenner had access to your line of credit for purpose  
4 of Little Isle IV investment without your authorization?

5 Could you repeat that, I didn't understand that?

6 Question: Sure. Isn't it a fact, sir, that  
7 when you filed the claim with the American Arbitration  
8 Association with reference with your dispute with Phil  
9 Kenner, you did not at that point, in 2009, make any claim  
10 that Phil Kenner had access to your line of credit without  
11 your authorization?

12 Answer: I don't recall.

13 That's another, I don't recall. You remember  
14 that -- the answer would be, Yes, I did. Or, No, I know he  
15 accessed my line of credit would my authorization. So the  
16 answer is, Yes. I don't recall?

17 Kenner Exhibit 11 is a master note signed by  
18 Michael Peca on March 31, 2005.

19 Kenner Exhibit 12 is a master note signed by  
20 Michael Peca, July 1, 2005.

21 Kenner Exhibit 17 is the application made by the  
22 Pecas with reference to the their line of credit.

23 Kenner Exhibit 14 is the promissory note that  
24 they, Michael Peca signed, that pledged his bond as  
25 collateral to the line of credit.

**Summation - Mr. Haley**

5802

1 Kenner Exhibit 14 is a change in firm agreement  
2 signed by Michael Peca.

3 Let me also speak, ladies and gentlemen, about  
4 the government's allegation concerning, with all of their  
5 charts, the use of the lines of credit to pay off another  
6 line of credit. We did give you a chart. And our chart  
7 didn't have the colors and the pictures or anything of  
8 that nature. But it did indicate the uses for which the  
9 lines of credit were committed as relates to the  
10 development of the Hawaiian land project, and the list is  
11 in evidence. You'll have an opportunity to you view it.

12 But it did involve paying off other lines of  
13 credit. That was, these were pooled funds, meaning that  
14 once the money came into the Little Isle IV account, it  
15 was used for any number of purposes. And once it became  
16 part of the pool, if there was an interest payment due on  
17 someone else's line of credit, it got paid. Why? So that  
18 the collateral did not get lost.

19 As a matter of fact, you heard there was a  
20 legitimate business reason for doing it that way, because  
21 you could place a bond and the bond is going to continue  
22 to earn interest, and you don't want any lines of credit  
23 to go into default. So you would utilize part of that  
24 pool once it goes into the pool to pay off someone else's  
25 line of credit.

**Summation - Mr. Haley**

5803

1           That is not a scheme to defraud. That's not  
2           outright theft, as you would hear with an elevated voice  
3           by the prosecutor in this case. That was part and parcel  
4           of the investment modality that Phil Kenner was utilizing  
5           as the managing member of Little Isle IV.

6           All of those times when the government would  
7           then isolate on a master note -- you read that towards the  
8           end with Sergei Gonchar.

9           And they said, Well, were you aware at this  
10          point in time, \$375,000 was being taken out of your line  
11          of credit? And indeed that would increase the requisite  
12          bond pledge.

13          No, I wasn't aware of that.

14          You can't tell me that is fraud. That was the  
15          business protocol by which the lines of credit were being  
16          used to keep the investment vehicle in Little Isle IV  
17          alive.

18          And you heard that it wasn't a situation where  
19          Phil would -- the business model wouldn't work if every  
20          time Phil had to access someone's line of credit for the  
21          purpose of a particular expense, he would call them up  
22          half a world away and say, Oh, by the way this is what I'm  
23          doing.

24          They knew by way of each one of those pledges --  
25          and you saw them in evidence -- that Phil Kenner was

**Summation - Mr. Haley**

5804

1 authorized to access my line of credit. And that is what  
2 happened here, ladies and gentlemen. Full authorization,  
3 no theft or fraud. This was not a scheme to defraud as  
4 relates to any aspect of it. But certainly in no respect  
5 is there proof beyond a reasonable doubt that the manner  
6 in which the lines of credit were utilized by Phil Kenner  
7 constituted a crime.

8 You know, Joe Juneau, it was brought up on the  
9 government's summation -- Yes, they did use a line of  
10 credit to, access to a line of credit from Owen Nolan to  
11 pay off Joe Juneau's line of credit, so that his line of  
12 credit was satisfied and there was no loss of his bond as  
13 pledged. And that is what that e-mail meant.

14 And you may recall that that happened because  
15 Joe Juneau though an original investor in Little Isle IV,  
16 decided, I committed to the investment but I want out.

17 And Phil said, You know that's a little unusual.  
18 You're now leaving us in the lurch. We're trying to get  
19 this project started. You say, I'm in. And then you  
20 change your mind. Well, okay.

21 So they brought other investors in. Those  
22 investors then obtained their percentage interest in the  
23 Hawaiian land development as represented by Little Isle  
24 IV, and Joe Juneau was paid out, got out of it. Joe  
25 Juneau lost no money in the final analysis, either by way



**Summation - Mr. Haley**

5805

1 of his commitment to Little Isle IV, or whatever  
2 investments he made in Eufora. He is not a victim.

3 And for the government to say, Well, the persons  
4 do not have to lose money to be victims. That is  
5 absolutely true. Of course that is true. But what  
6 happened here was not designed or intended to defraud  
7 anyone.

8 THE COURT: Do you want take a break?

9 MR. HALEY: Yes, your Honor. May we take a  
10 break?

11 THE COURT: Don't discuss the case.

12 (A recess was taken.)

13 (After recess the following occurred outside the  
14 presence of the jury.)

15 MR. HALEY: Your Honor, I know I'm not going to  
16 be finished at 4:30.

17 THE COURT: Okay, we'll stop at 4:30.

18 MR. HALEY: Thank you, sir.

19 I do recall the Court saying to Mr. LaRusso, if  
20 you need five hours you can have five hours.

21 THE COURT: Did I?

22 MR. HALEY: It is not my intention. I was  
23 raising my hand.

24 (The jury entered the courtroom.)

25 THE COURT: Mr. Haley.

**Summation - Mr. Haley**

5806

1 MR. HALEY: Thank you.

2 It is certainly not my intent or desire to test  
3 your patience, ladies and gentlemen. I hope that at least  
4 the summations of both the government as well as the  
5 defense will result in at least your deliberations being  
6 focused on the issues, at least as relates to how the  
7 litigants or the attorneys view those issues. And perhaps  
8 it will assist in moving those deliberations along in a  
9 meaningful fashion. Which is not to say you should not  
10 give full and complete consideration during your  
11 deliberations to both the government's case and our cases  
12 and what the defense says. So please, bear with me.  
13 Thank you.

14 I did mention, ladies and gentlemen, we don't  
15 have many charges, but we got a couple. And this relates  
16 to the Hawaiian land development. This is the chart you  
17 may recall, indicating the various contributions of the  
18 hockey player investor clients in Little Isle IV and any  
19 expenses. We did reference that earlier, and I wanted to  
20 locate it for you.

21 So rather, at least this is a rather detailed  
22 representation of the expenditures. And I might add,  
23 ladies and gentlemen, as Judge Bianco will tell you, the  
24 burden of proof never shifts when a defendant puts a case  
25 on. The burden of proof always remains upon the

**Summation - Mr. Haley**

5807

1 government to prove their case beyond a reasonable doubt.

2 Mr. Kenner testified that these expenses, as  
3 well as the contributions as set forth on that document  
4 were supported and are supported by bank records. And  
5 those bank records, as indicated by Mr. Kenner during the  
6 course of his testimony, have been and are in the  
7 possession of the government.

8 So if you -- if it were an instance, let's say  
9 where there was not an expense related to land plans,  
10 there was not an expense related to archeology, there was  
11 not an expense related to salary and payroll; rest assured  
12 that the government would have cross-examined Phil Kenner  
13 on the absence of such expenses.

14 Consulting fees. Well we know there were  
15 consulting fees. As a matter of fact, the Urban Expansion  
16 Loan and indeed the -- well, specifically the funding  
17 consultant agreement was just that, a funding consultant  
18 agreement. So all of those expenditures, ladies and  
19 gentlemen, were part and parcel of the Hawaiian land  
20 development project.

21 That doesn't suggest some sort of deceitful  
22 conduct on part of Phil Kenner. We learned that  
23 throughout this process Phil Kenner was actually texting  
24 people, you're to going see some of those texts at one  
25 a.m. to keep this project going. The idea that somehow

**Summation - Mr. Haley**

5808

1 this, the Hawaiian land project was part and parcel again  
2 of a massive scheme to defraud.

3 You saw the photographs. This project, the  
4 Hawaiian land project had real potential; beautiful,  
5 beautiful scenery, beautiful property, architects hired,  
6 Chris Manfredi testified as to what they were trying to  
7 accomplish.

8 We know -- and this is a point I'll discuss a  
9 little later on -- we know that it didn't come to fruition  
10 through no fault of Phil Kenner. It didn't come to  
11 fruition because what ultimately happened was land values  
12 tanked, and Lehman Brothers went bankrupt. That is what  
13 happened here.

14 We will be speaking, rest assured before I  
15 finish my summation, about the Jowdy loan. Because that  
16 is critical in connection with what transpired here.

17 But it was the real deal. You know, this is  
18 not, this is not a Bernie Madoff type of Ponzi scheme as  
19 Mr. Miskiewicz would suggest to you, where he was taking  
20 investor money and not investing it at all, but simply  
21 paying back other investors with investors' money.

22 They had, they had titles of land. You saw the  
23 title documents. They had consulted for purposes of  
24 obtaining vertical construction loans. And the ideas in  
25 connection with those loans from -- to hard money loans,

**Summation - Mr. Haley**

5809

1 was that though the hockey player investors had  
2 contributed and committed significant amounts of money to  
3 the Hawaii land development project, in order to make this  
4 project work you needed additional funding. Wasn't that  
5 crystal clear?

6 Unless you were going to take an instance where,  
7 where you collapsed the project and didn't look to make  
8 its potential, there is going to be the risk and you're  
9 looking to ultimately see that project as successful.

10 The Lehman loan was huge. Lehman had committed  
11 to, I believe it was \$105 million. That was part and  
12 parcel of keeping the project going. We'll speak later,  
13 because I just want to go back to my perspective about  
14 whether when Lehman, when the Lehman loan came through,  
15 the money that went to Tommy Constantine by way of the  
16 Urban Expansion Loan was fraudulent. I'll talk about that  
17 at an appropriate time.

18 But let me also give you an example. Phil  
19 Kenner would track, and this is just one example -- here  
20 is an example of what happened to Sergei Gonchar's line of  
21 credit. It shows where the contribution was made on a  
22 given day. It shows where the money went. It's  
23 consistent with the charges you saw a moment ago --  
24 direct, employee payroll, expenses reimbursed through  
25 Kenner -- Phil was entitled to reimbursement of expenses

**Summation - Mr. Haley**

5810

1 associated with the Hawaiian land project. He was  
2 entitled to take a draw. As a matter of fact, John Kaiser  
3 told you that. No salaries, sure, salaries were part and  
4 parcel of normal approved business expenses, expenditures.  
5 And to suggest that the hockey player clients were somehow  
6 misled when Phil Kenner took an expense reimbursement  
7 without calling up ahead of time, or again as indicated  
8 here utilized Sergei's line of credit in connection with  
9 an attorney payment here, in connection with these  
10 expenses, is simply untrue.

11 And as I said a moment ago, as relates to the  
12 bank records that would support that, the government is in  
13 possession of those bank records. So if that direct  
14 11/9/05, \$2,166 -- payment for -- 4000 employee payroll  
15 was not supported by bank records, you would have been  
16 hearing Mr. Miskiewicz. I don't know if he talked about  
17 rabbit holes. But you would be hearing Mr. Miskiewicz  
18 talking about how the bank records did not support what  
19 the defendant is putting in front of you. Believe me.

20 Well, actually it's kind of a shame because we  
21 know what is happening with real estate. Can you imagine  
22 Lehman Brothers going bankrupt? What would that property  
23 -- no expert testified in that respect. But there was  
24 some evidence that the potential for the investment in the  
25 Hawaiian land development project ultimately explode.

**Summation - Mr. Haley**

5811

1 By the way, you know, we did talk about evidence  
2 in connection with ownership interest. It was an issue to  
3 be decided by you. The reality is that those ownership  
4 interests are and were recorded on the books and records  
5 of Little Isle IV. And once it is recorded on the books  
6 and records of Little Isle IV, any one of those hockey  
7 player investors, should there come a point in time where  
8 the property was sold and they weren't getting a return on  
9 their investment, they could certainly consult an  
10 attorney. And we have a record that says, there's your  
11 ownership interest. You have a fairly compelling case in  
12 court to get your money back. Because it is reflected on  
13 the books and records.

14 So as an example, Kenner said that on the K-1,  
15 Kenner Exhibit 62. Withdrawn.

16 (Continued on the following page.)  
17  
18  
19  
20  
21  
22  
23  
24  
25

**Summation - Haley**

5812

1 (Continued from the previous page.)  
2 BY MR. HALEY: Let me just also give you an  
3 example of what transpired at least in connection with  
4 Peca LLC distributions, the chart matches up with the bank  
5 records once again, and I will not go through all of this  
6 document. You'll have an opportunity to review it. But  
7 we do have, and we'll talk about it at the appropriate  
8 time. We do have a \$395,000 to Kaiser, Led Better loan.  
9 And let me address that now because the operating  
10 agreements for Little Isle IV, the original operating  
11 agreement and it is in evidence, the little original  
12 operating agreement without question focused solely and  
13 exclusively on the Hawaii land development, no question  
14 about it. It existed consistent with the discussion that  
15 Phil Kenner had with his hockey player investors that this  
16 is all about Hawaii and let's invest in Hawaii. That  
17 document you will see crystal clear. There is a special  
18 projects provision in that document but that talks about  
19 the expenditure of money to do research. I wouldn't  
20 suggest to you the special projects provision in the  
21 original Little Aisle IV authorized lending, it didn't.  
22 But there did come a point in time there was a  
23 modification to the operating agreement and that is also  
24 in evidence, and that modification specifically permitted  
25 in writing lending in the discretion of the managing



**Summation - Haley**

5813

1 member which was, still it is, Kenner, and that document  
2 which was signed by Phil Kenner, John Kaiser, interesting  
3 enough, no allegation that John Kaiser's signature at  
4 least by way of any expert testimony on this document was  
5 a forgery, but it is John Kaiser. I don't know what to  
6 say other than there is no proof that this signature on  
7 the document is a forgery, and that is the document of  
8 which reads as follows: At the sole discretion as the  
9 managing member Little Isle IV may participate as a lender  
10 if deemed by the managing member to be in the best  
11 interest of the LLC.

12 Well, let's get right to the point with  
13 reference to the lending that clearly occurred out of  
14 Little Isle IV to Ken Jowdy for purposes of Ken Jowdy  
15 utilizing that money as relates to the Mexico and the  
16 development of the property. That loan was indeed a loan  
17 that initially did not have a document in support of.  
18 Initially there were loan payments, money coming out of  
19 Little Isle IV going into down Mr. Jowdy's way by various  
20 maybe circuitous routes, but heading down there.

21 Indeed Phil testified, and the bank records  
22 support it, and if there wasn't the Government wouldn't  
23 have cross-examined him on it, when it went out Jowdy was  
24 paying it out, with interest. There came a time as  
25 testified to by Phil Kenner it is a decision that is made

**Summation - Haley**

5814

1 actually involving John Kaiser who we say, look, we have  
2 money going out of Little Isle IV, the money is going to  
3 Ken Jowdy. Our project right now is in a state of flux or  
4 at least because of the time it took, remember all the  
5 time it would take to get the necessary permits and  
6 projects in place, develop land, we have access to money,  
7 through the line of credit, and they loan this out as they  
8 did at 15 percent interest, as I recall, so that we're  
9 making some money on the loan. That was a decision that  
10 was arrived at by both Phil Kenner and John Kaiser.

11 There comes a point in time where with John  
12 Kaiser's knowledge, if not insistence, let's memorialize  
13 this loan by way of a written document, and indeed that is  
14 in evidence and that's the revolving line of credit as  
15 signed by Ken Jowdy.

16 This provision here at the sole discretion of  
17 the managing members Little Isle IV may participate as a  
18 lender if deemed by the members of the LLC if the  
19 operating agreement that authorized that, and again it is  
20 in evidence, ladies and gentlemen, that authorized that  
21 lending to Ken Jowdy.

22 Now, Phil testified that he did speak with his  
23 hockey player clients as relates to the loan coming out of  
24 Little Isle IV to Jowdy. There's a question, admittedly,  
25 as to whether Phil actually spoke with each one of them

**Summation - Haley**

5815

1 before the lending had to take place, but each one of them  
2 did become aware of that loan. As a matter of fact,  
3 Michael Peca testified, it's in the record before the  
4 grand jury, yes, I learned of the loan, not immediately,  
5 but I learned of the loan sometimes after the money had  
6 started to come out of Little Isle IV to Jowdy and I had  
7 no objection to it. Why would he have an objection to it?  
8 It will make him some money, and that's a business  
9 decision by the way, where otherwise money is remaining  
10 dormant.

11 When the Government is arguing in its summation  
12 that the circumstances under which the revolving line of  
13 credit document itself suggests fraud or suspicion, in  
14 what sense, ladies and gentlemen?

15 Phil Kenner testified that there was a point in  
16 time I'm with Ken Jowdy in Mexico and they did have a  
17 business relationship, no question about it, Phil Kenner  
18 and Ken Jowdy. And the document, specifically the  
19 revolving line of credit, was created for purposes of  
20 having a written document in place in order to memorialize  
21 and verify the loan that existed.

22 What did he testify to? He said the document  
23 was created, it was copied by Ken Jowdy and he kept the  
24 original. That is not suspicion. To say that can Ken  
25 Jowdy have a copy machine in his hotel room? I don't know

**Summation - Haley**

5816

1 if there is any testimony that it happened in a hotel room  
2 or not, that is sheer speculation. We know Kenner Jowdy  
3 has offices, he's running Diamonte Cabo San Lucas so to  
4 suggest by way of that speculation by Mr. Miskiewicz  
5 outside the record that under those circumstances it must  
6 be fraudulent, I don't know how to answer that, ladies and  
7 gentlemen. All I can say is this: The document itself is  
8 witnessed by Robert Gaudet. You may say by way of the  
9 loan document, Kenner says it is accurate, Jowdy, who  
10 knows whether that is his signature, but Robert Gaudet  
11 signed the document and if there is any issue -- if you  
12 are creating a fraudulent document, I guess the claim the  
13 Government would be, well, I forged Jowdy's signature, I  
14 forged Robert Gaudet's signature. I don't now how to  
15 answer that, ladies and gentlemen.

16 You know what the theory of the Government is.  
17 Our theory is let's start out that Phil Kenner is a  
18 fraudster and let's just make the evidence fit, so  
19 everything he does must necessarily be fraudulent.

20 I don't know how to respond to that.

21 Okay. So we have of course the Little Isle IV  
22 operating agreement. And by the way when it comes to the  
23 operating agreements, the hockey player clients did  
24 testify, I think on more than one occasion, and again  
25 ladies and gentlemen it is your recollection that

**Summation - Haley**

5817

1 controls. We would get a lot of documents. One of them  
2 said, remember that, I would pronounce is ASH -- it was  
3 actually a shitload of Hawaiian documents. That's what he  
4 was saying in the e-mail. So they would get those  
5 documents from Phil Kenner and those documents would  
6 include revised operating agreements, existing documents,  
7 documents related to the Hawaii land development. It  
8 wasn't a matter of Phil Kenner hiding anything like the  
9 bylaws of Little Isle IV that authorized the lending as  
10 relates to Mr. Jowdy.

11 So we'll get to that, but this loan, this Peca  
12 that comes out as set forth that the money that went out  
13 of Peca's LLC to Kaiser in the amount of \$395,000, at that  
14 the point there had been an operating agreement that  
15 authorized loans to go out and indeed what was happening  
16 here there was a loan coming out of the Little Isle IV  
17 account, no question about it, traceable to Peca's line of  
18 credit, a loan to Kaiser which was permitted under the  
19 operating agreement, with the expectation that Kaiser  
20 would be paying it back and it would go back into the  
21 Little Isle IV account and it happened in that way. That  
22 of course involved the Led Better and rather than digress  
23 at this point in time let's stay focused on at least the  
24 Hawaiian land project because the Government tells you  
25 this is a massive fraud on the part of Phil Kenner.

**Summation - Haley**

5818

1 By the way this is the document that I'm  
2 referring to from Michael Peca, Kenner Exhibit 21: Oh,  
3 yeah, thanks, cleaning up my files today. We never did  
4 get the documents on the Mexico stuff. I have a shitload  
5 of Hawaiian docs in Mexico. We got them. Thanks.

6 When we speak in terms of the members interests,  
7 the Government made a great deal of the fact that  
8 ostensibly nondisclosure of the loan in documents such as  
9 the limited liability company agreement of Little Isle IV  
10 dated April 26, 2006, failed to mention the Jowdy loan in  
11 that document was part of deceitful conduct on the part of  
12 Phil Kenner, that's the argument they make.

13 Phil Kenner, as relates to that document and  
14 other documents said, these were not state of the union  
15 documents. They had a specific purpose from a business  
16 standpoint. This wasn't a function of looking to hide the  
17 Jowdy loans from anyone. Here are the members' interest,  
18 ladies and gentlemen. Members and percentages on schedule  
19 (a). Again you'll have this. This is Kenner Exhibit 1,  
20 the very first exhibit we wanted you to see was this.

21 You don't go through all this trouble if you are  
22 creating this artificial scheme to defraud somebody and  
23 this is the one, Kenner Exhibit 1, is where you see each  
24 member in witness whereof, each member has executed this  
25 agreement as of the date first set above. And we have

**Summation - Haley**

5819

1 Berard -- you know what I'll do, I'll just close my eyes  
2 and pick a page.

3 We have Glen Murray, we got Mattias Norstrom, we  
4 have Turner Stevenson. We got -- actually there is Phil  
5 Kenner's signature. We have Greg DeVries.

6 So here is the limited liability company  
7 agreement that is relevant for having proper documentation  
8 in effect with reference to Little Isle IV.

9 The Government tells you that the July 21, 2006,  
10 agreement which was the agreement whereby Phil Kenner  
11 writes to all the members of the LLC. I'm writing to tell  
12 you about a very positive development concerning your  
13 Hawaiian real estate developments to Little Isle IV LLC.  
14 As managing member of the company, I have the authority to  
15 commit the company to the transactions described in the  
16 letter. Nevertheless, I'm asking your acknowledgment and  
17 consent to these transactions as they will change your  
18 investment, albeit, for the better, in my opinion.

19 That sets forth the information, this was  
20 actually as relates to the Lehman loan. It was required  
21 by the Lehman lenders and their attorneys. As a matter of  
22 fact, Phil was not trying to be deceptive or deceitful but  
23 my memory of his testimony, I didn't create this, this was  
24 created by the lawyers that were involved in the Lehman  
25 transaction and they wanted to make sure this document or

**Summation - Haley**

5820

1 they needed this document in place so each one of the  
2 members had an understanding as to what the loan would  
3 cover.

4 Indeed we have a response form: I acknowledge  
5 receipt of the letter of July 21, 2006, of Philip A.  
6 Kenner, (the letter) to each of the members of Little Isle  
7 IV LLC, (the Company).

8 You might remember this response form, because  
9 when John Osborn testified, he testified that he relied  
10 upon various documents presented to him as known signature  
11 documents in determining whether or not the signature of  
12 John Kaiser was non genuine. And indeed I have to remind  
13 you that that report is highly probable, not that we can  
14 conclude as if there is no doubt. He did that for your  
15 benefit. Who do you think he meant we can conclude? He  
16 said you should conclude that this signature is non  
17 genuine. Well, that's your decision, ladies and  
18 gentlemen, not his decision.

19 One of the known documents presented to him was  
20 indeed a document signed by John Kaiser. So at least as  
21 relates to the response form with reference to Kenner  
22 Exhibit 93, we know that John Kaiser signed his name to  
23 that document because it was given to their expert as a  
24 known -- as a document wherein John Kaiser says that is my  
25 signature.



**Summation - Haley**

5821

1 I don't know if you recall, but when John Kaiser  
2 was cross-examined, it was that document -- I think it was  
3 that document -- it was this document -- I apologize. I  
4 don't know if you recall but when John Kaiser testified, I  
5 showed him a document and he acknowledged it was his  
6 signature, perhaps it was this document, I don't know, and  
7 then I wanted to question him in connection with the  
8 content of that document. He said that's my signature but  
9 I didn't read it.

10 There was some cross-examination about, well, do  
11 you read architectural plans, things of that nature? That  
12 became part of the theme in connection with many of the  
13 Government witnesses when presented with a document that  
14 they knew existed or a document that may be contradictory  
15 to their testimony, their effort to avoid questioning on  
16 that. Well, yeah, that's my signature but I didn't read  
17 the darn thing. Okay.

18 The Little Isle IV, July 21, 2006, document,  
19 became really a big part of this litigation because it is  
20 Kenner 2, it's Kenner 93, Kenner Exhibit 16, Kenner 70,  
21 although that wasn't admitted in evidence, ladies and  
22 gentlemen. Okay.

23 I talked about the original operating agreement,  
24 Little Isle IV. I just want you to have this. It's the  
25 last time I will say it. Each one of these documents you

**Summation - Haley**

5822

1 have a right to request be delivered to you for your  
2 review in your deliberation, but it is Kenner 25, it  
3 speaks for itself. That was the original operating  
4 agreement that did not contain the ability to lend.

5 The ability to lend did come -- looks like  
6 Kenner Exhibit 217. Some of these exhibits, ladies and  
7 gentlemen, designation numbers may change because sometime  
8 they are remarked by a different number but that's at  
9 least what my record reflects.

10 Let me get to the Semple point from the defense  
11 perspective and it relates to the Hawaiian land  
12 development. We know it didn't work out, but had Ken  
13 Jowdy honored the loan commitment he made to allow for and  
14 pay back at 15 percent interest, the moneys loaned to him  
15 that are reflected in bank records, Phil Kenner testified  
16 that as of the day he testified, that money loaned at  
17 15 percent interest would concern \$18 million to the  
18 Little Isle IV entity. And it would have, by his  
19 calculation, made each and every one of his hockey player  
20 clients whole for their investments. The hockey player  
21 clients did lose money, no question about it. When the  
22 Lehman loan was closed, money was then transferred, and we  
23 have that in Kenner Exhibit 19, Government 2103, was then  
24 transferred out of Northern Trust to various hockey  
25 players. Those who had invested \$100,000, their return

**Summation - Haley**

5823

1 was \$42,553. So they took a loss, but it wasn't a  
2 complete loss.

3 You know when it comes to that, you may recall  
4 that there was at least questioning by many of the  
5 witnesses wherein the Government would say, well, sir,  
6 isn't it a fact that you didn't get a penny back from your  
7 investment? Well, they didn't get a profit back from  
8 their investment, ladies and gentlemen, but they did get  
9 money back. And it translated into about 42 percent of  
10 their investment, whether it was the 100,000 or whether  
11 the math works out, a percentage, it may have been  
12 essentially the percentage as the line of credit. We do  
13 know that many of them also to their credit ended up  
14 obtaining some settlement with Northern Trust, so the loss  
15 they suffered was indeed compensated in part by Northern  
16 Trust. Why Northern Trust did that, the reason for it,  
17 it's not part of this case. God bless them. They got  
18 some of the money back from Northern Trust.

19 The Government made the point, it's a legitimate  
20 point, that no fraud exists if people get money back, I'm  
21 not trying to say that but I am saying this: Would we be  
22 here today, would we really be here today if the Jowdy  
23 loan was paid back and those hockey players were made  
24 whole as a result of that money coming back? And perhaps  
25 as significantly, would we be here today had John Kaiser

**Summation - Haley**

5824

1     pursued the \$4 million in milestone payments that were due  
2     Ula Makika which was then the LLC, wherein that money  
3     would have gone to Ula Makika and then be available for  
4     distribution to the hockey player investor clients?

5             You know, I think one of the witnesses testified  
6     to this. I didn't authorize the Hawaiian loan money to go  
7     to Mexico, but had it happened that Jowdy had honored the  
8     loan, had it happened that John Kaiser pursued the  
9     milestone payments and they all came back into the pot, so  
10    to speak, would there anyone being here and saying I got  
11    all my money back but I want you to prosecute Phil Kenner  
12    for fraud? The Government wouldn't be taking the case.  
13    That just wouldn't make sense, ladies and gentlemen.

14            No one will say, whoa, whoa, whoa, don't give me  
15    the money that I invested through the LLC, don't return  
16    that to me, because you never told me about the loan so I  
17    don't want it.

18            They take it willingly, and I kind of suspect  
19    that if that happened, you might have heard every one of  
20    the hockey players investor clients saying I knew about  
21    the loan, knew about it from day one.

22            The Government is orchestrating a crime here,  
23    ladies and gentlemen, and they have a motive for doing it  
24    and we'll be talking about that.

25            Okay. Look, I know it gets complicated, but as

**Summation - Haley**

5825

1 I said before, complicated financial transactions are not  
2 proof beyond a reasonable doubt of criminal activity.

3 We have talked about during the course of the  
4 trial and the Government in its summation talked about the  
5 Urban Expansion loan. Well, the Urban Expansion loan  
6 resulted in the need to preserve Waikapuna, as one of the  
7 properties that was the part of Little Isle IV, and you  
8 may recall that the loan was needed because they had to  
9 make good in terms of making payments to, I forget the  
10 senator's name, that was going to charge them significant  
11 interest over a period of time had they not come up with  
12 the cash to close on the purchase, and it was through  
13 Tommy Constantine that the funding occurred, so that  
14 Waikapuna was not lost for the Hawaiian investors.

15 As a matter of fact, Chris Manfredi confirmed  
16 all of what Phil Kenner had to say about Waikapuna, in  
17 terms of the need to come up with the funding to purchase  
18 the property, to stop the interest payments and to do that  
19 quickly. As a matter of fact, he characterized the need  
20 for that loan as being urgent.

21 Who was the person who came up with the funding  
22 for that critical infusion of cash at that point in time?  
23 It was Tommy Constantine. And that's what the Urban  
24 Expansion loan was all about.

25 Now, the Government made a big deal about the

**Summation - Haley**

5826

1 prepayment penalty on that loan, and Phil Kenner told you  
2 that prepayment penalties of that type were not unusual at  
3 all in this hard money lending market. So that was not a  
4 scheme to defraud, ladies and gentlemen, it was a business  
5 decision that occurred because they were in at least from  
6 Phil Kenner's perspective, financial straits or a  
7 financial squeeze where they needed to come up with that  
8 money. Who ultimately came up with that money? Tommy  
9 Constantine and actually Tommy Constantine or I should say  
10 Jim Grdina, money flowed back to them, there is no  
11 question about that. But that particular transaction as  
12 reflected on the Government's Chart 17, is the background  
13 by which the Urban Expansion money came from for the  
14 purpose of the Waikapuna closing and the payments that  
15 were later made out to Urban Expansion that went to  
16 Constantine, as relates to Lehman's disbursement of moneys  
17 following the Lehman closing. As a matter of fact, in  
18 Cabo, as relates to a Lehman loan that was actually  
19 obtained in Cabo, I believe Phil Kenner testified that the  
20 Lehman loan there had a \$125 million prepaid penalty. So  
21 the exorbitant prepayment penalties you will see in these  
22 hard money loans was not unusual, and I know it gets  
23 complicated, ladies and gentlemen, but it's not fraud.

24 So there's no confusion as relates to the  
25 knowledge of Mr. Peca in connection with the ultimate

**Summation - Haley**

5827

1 knowledge that the loan was flowing out of Little Isle IV  
2 with the Hawaiian land project to Mexico, we have this  
3 testimony.

4 Question: I'm just going to ask you to just  
5 read to yourself and specifically for the record, drawing  
6 your attention to the question and answer beginning at  
7 line 7 and read through approximately 20.

8 I'm sorry.

9 The witness: 30.

10 Mr. Haley: Thank you.

11 Question: Now, does that refresh your  
12 recollection as to what you said in 2011 about where the  
13 money was going, meaning the money from your line of  
14 credit?

15 Answer: Yes.

16 That referred to his prior grand jury tell.

17 Question: What did you tell them?

18 Answer: I asked, basically told them that the  
19 Hawaii investment started with the cash investment of  
20 100,000 and a line of credit for 1.775 used for Hawaii.

21 Question: And did you indicate or did you say  
22 that you knew something about Ken Jowdy getting some of  
23 that money at some point in the form of a loan?

24 Answer: It was never in the outset. I never  
25 knew when the loan was made to Ken Jowdy or notified when

**Summation - Haley**

5828

1 the loan was made to Ken Jowdy. We were told well after  
2 the fact that the loan was made to Ken Jowdy. There were  
3 so many parts in moving investments that just became part  
4 of the conversation.

5 Question: In 2011 you will agree with me, you  
6 did say that some of that money was a loan to Ken Jowdy?

7 Answer: Correct. At that point I learned that  
8 some of the money was to be used to loan to Ken Jowdy.

9 Question: Who told you that the money in your  
10 line credit went to Ken Jowdy?

11 Answer: Phil Ken did, but it didn't start out  
12 the money from Little Isle IV which belonged to Ken Jowdy.  
13 It started out that we made a loan to Ken Jowdy.

14 Question: When did he tell you that?

15 Answer: I couldn't tell you exactly, starting  
16 in 2010.

17 So again, ladies and gentlemen, there may have  
18 been instances where when the loan was first made to Ken  
19 Jowdy, Phil Kenner did not tell, certainly Mr. Peca, at  
20 least by his testimony, that it happened, when it  
21 happened, he told him immediately but he didn't hide it  
22 from his clients and they became aware as indicated by  
23 that particular testimony.

24 Your Honor, I'm about ready to move into a new  
25 area. Is this an appropriate time to stop?



**Summation - Haley**

5829

1 THE COURT: We'll break for the day and  
2 reconvene on Monday at 9:30. We'll provide you with lunch  
3 on Monday. I want to use as much of the day as possible  
4 so we'll take a shorter lunch break.

5 So Michelle will use the local deli, and you can  
6 check off the menu as you want so we can maximize the time  
7 on Monday. I want to remind you don't read or listen to  
8 anything regarding the case. Don't discuss the case.

9 Have a great fourth of July weekend. I'll see  
10 you all on Monday morning.

11 Thank you.

12 (Whereupon, at this time the jury exits the  
13 courtroom.)

14 THE COURT: If everyone will be seated. So how  
15 much more do you think you have, Mr. Haley?

16 MR. HALEY: Sorry, your Honor?

17 THE COURT: How much more do you think you will  
18 have on Monday?

19 MR. HALEY: May I just reflect for a moment,  
20 Judge?

21 THE COURT: Sure.

22 I cannot envision, Judge, going beyond an  
23 hour-and-a-half. I hope your Honor appreciates only  
24 because of the level of allegations and the quantity of  
25 allegations.

5830

1 THE COURT: An hour-and-a-half is okay. If you  
2 would say more than that, I would question you, but that  
3 is reasonable.

4 MR. HALEY: And I'm confident and I will keep in  
5 mind your Honor's suggestion and absolute direction.

6 THE COURT: So I may not instruct them until  
7 Tuesday morning. I'm concerned.

8 Based upon that, do you think you'll be two, two  
9 and a half hours?

10 MR. LARUSSO: It will be longer to be honest.

11 THE COURT: Longer than two and a half?

12 MR. LARUSSO: I haven't really finished it.  
13 Knowing me I'm usually longer than my estimate. I'll try  
14 to keep it at that but it may be a little longer.

15 THE COURT: I'll see you Monday morning at 9:30.  
16 Have a good weekend.

17 (Proceedings adjourned until Monday, July 6,  
18 2015, at 9:30 a.m.)  
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I N D E X

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